No.

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. The questions presented are as follows:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the International Brotherhood of Teamsters Local 760 is also a party to the proceeding. It was an intervenor in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 705 F.3d 490. The decisions and orders of the National Labor Relations Board (App., *infra*, 56a-63a) and the administrative law judge (App., *infra*, 63a-90a) are not yet reported but are available at 2012 WL 402322.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Recess Appointments Clause of the Constitution (Art. II, § 2, Cl. 3) provides as follows:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 93a-99a.

STATEMENT

1. a. The National Labor Relations Board is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq*. The Board consists of five members, who are appointed by the President by and with the advice and consent of the Senate and who serve five-year terms. 29 U.S.C. 153(a). The Board is authorized to delegate any of its powers to a panel of three or more of its members. 29 U.S.C. 153(b).

Three members of the Board constitute a quorum. 29 U.S.C. 153(b). When the Board has delegated authority to a three-member panel, two members may act as a quorum of the panel, *ibid*., except when the membership of the Board itself falls below three members, see *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640-2645 (2010). Thus, when three positions on the Board become vacant, neither the Board nor any panel may exercise the Board's authority. Until the statutory quorum requirement is satisfied through the appointment of new members, the Board cannot adjudicate charges that employers or unions have engaged in unfair labor prac-

tices; nor can it issue cease-and-desist orders or provide affirmative remedies such as reinstatement and backpay to employees who have been injured by such practices. See generally 29 U.S.C. 160(a) and (c).

b. As of August 2010, the Board had a full complement of five members. On August 27, 2010, the term of one Board member expired, and the President submitted a nomination for that office to the Senate. See App., *infra*, 16a; 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). One year later, on August 27, 2011, another member's term expired, which left the Board with the minimum needed for a quorum under 29 U.S.C. 153(b) and *New Process Steel*. App., *infra*, 16a. The President submitted a nomination for that office to the Senate. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

One of the three remaining members of the Board, Craig Becker, had been appointed during a recess of the Senate in 2010. Because the Recess Appointments Clause provides that the term of a recess appointee "shall expire at the End of [the Senate's] next Session," and Becker's recess appointment had been made during the second session of the 111th Congress, it was understood that his commission would expire at the end of the first session of the 112th Congress. App., *infra*, 15a.[1]

The first session of the 112th Congress ended at noon on January 3, 2012, when the second session began by operation of the Twentieth Amendment.[2] At that time,

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[1] The President had nominated Becker to a position on the Board, but in light of Senate inaction, the President withdrew that nomination and nominated someone else. 157 Cong. Rec. at S8691.

[2] In pertinent part, the Twentieth Amendment provides: "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." Amend. XX, § 2. Thus, absent enact-

Member Becker's seat became vacant, and the Board ceased to have a quorum because the Senate had not acted on any of the President's nominations to the three vacant offices.

Approximately two weeks earlier, during the first session of the 112th Congress, the Senate adjourned pursuant to an order adopted by unanimous consent. App., *infra*, 91a-92a (reprinting order). That order provided that the Senate would reconvene "for pro forma sessions only, with no business conducted," on three dates between December 17 and the end of the session on January 3. *Id.* at 91a. Each "pro forma session," was to be followed immediately by another adjournment. *Ibid.* The Senate's order further provided that following the commencement of the second session of the 112th Congress (at noon on January 3), the Senate would again adjourn, reconvening only for pro forma sessions, "with no business conducted," on five specified dates between January 6 and January 20, with each pro forma session again being followed immediately by another adjournment. *Ibid.* The order provided that the Senate would resume business on January 23. *Id.* at 91a-92a. In another order entered the same day, the Senate specifically referred to its impending absence as a "recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (authorizing committees to report on January 13 "notwithstanding the Senate's recess").

By virtue of the Senate's unanimous-consent order, the second session of the 112th Congress began with a

ment of a law changing the date, a new enumerated annual session of Congress begins at noon on January 3. The prior enumerated session will end at the same time unless Congress has previously adjourned *sine die*, in which case the prior session will have ended on the date of that *sine die* adjournment. See p. 12, *infra*.

period of nearly three weeks, from January 3 to January 23, in which the Senate had provided that "no business [was to be] conducted," and during which no Senators were required to be in attendance other than the lone Senator who gaveled each pro forma session in and out. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, at 2, 13 (Jan. 6, 2012), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. In view of the Senate's explicit cessation of business for that extended period, the President determined that the Senate was in recess. Accordingly, on January 4, 2012, the President invoked the Recess Appointments Clause and appointed three new members to fill the vacant seats on the Board.

2. This case involves a final order issued by the Board shortly after the January 2012 recess appointments. Respondent, an employer in the State of Washington, had a longstanding collective-bargaining relationship with a union representing respondent's production employees. App., *infra*, 4a. In 2010, respondent and the union agreed upon the terms of a new collective-bargaining agreement, but respondent then refused to execute the agreement or carry out its terms. *Id.* at 4a-6a. After the union filed a charge with the Board, a regional director, on behalf of the Acting General Counsel, issued a complaint alleging that respondent had committed an unfair labor practice by refusing to execute and implement the agreement. *Id.* at 63a-64a; see generally 29 U.S.C. 158(a)(1) and (5); *H.J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-526 (1941) (refusal to sign written contract embodying agreed-upon terms of collective-bargaining agreement is unfair labor practice).

In September 2011, an administrative law judge found, following a hearing, that respondent had committed an unfair labor practice by refusing to execute an agreed-upon labor contract. App., *infra*, 63a-90a. The administrative law judge recommended that respondent be required to sign and implement the agreement and to make the employees whole for agreed-upon wage increases and benefits that respondent had wrongfully withheld. *Id.* at 86a.

On February 8, 2012, a three-member panel of the Board affirmed the administrative law judge's findings and conclusions and adopted his proposed order with minor modifications. App., *infra*, 56a-63a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the D.C. Circuit, and the Board filed a cross-petition for enforcement of the order. App., *infra*, 2a; see 29 U.S.C. 160(e) and (f).

Respondent not only contested the Board's order on the merits, but also contended, for the first time, that the Senate was not in recess when the President made the three recess appointments to the Board and that the Board therefore lacked a quorum when it issued its decision. App., *infra*, 2a-3a. Respondent claimed that the Senate's periodic "pro forma sessions" transformed what would otherwise be a 20-day recess in January 2012 into a series of three-day adjournments, each of which was individually too brief to constitute a recess. Resp. C.A. Br. 29-36. In response, the Board contended that, by adjourning on January 3 pursuant to the unanimous consent resolution that provided that the Senate would conduct no business until it reconvened on January 23, the Senate had entered into a recess, and the existence of periodic pro forma sessions during which no

business, including the giving of advice and consent on nominations, could be conducted did not divest the President of his constitutional authority to fill vacancies during that recess. Pet. C.A. Br. 23-71.

4. The court of appeals granted respondent's petition for review and vacated the Board's order. App., *infra*, 1a-55a. The court considered and rejected respondent's nonconstitutional challenges to the merits of the Board's order. *Id.* at 3a-10a. It also considered whether it had jurisdiction to address respondent's constitutional challenge, which had not been raised before the Board. *Id.* at 11a. The court found that, although "no governing precedent directly addresses this question," the "constitutional challenge to the Board's composition" fell within "the 'extraordinary circumstances' exception to the 29 U.S.C. § 160(e) [exhaustion] requirement." *Id.* at 11a, 13a.

Turning to the merits of the constitutional challenge, the court of appeals concluded that the President's appointments to the Board were not authorized by the Recess Appointments Clause. App., *infra*, 17a-52a. The court did not, however, rely on, or even discuss, respondent's contention that the Senate's pro forma sessions prevented its 20-day break from being a "recess" for purposes of the Recess Appointments Clause. Instead, the court based its decision on different constitutional grounds.

a. The court of appeals first held that the Recess Appointments Clause does not apply to all recesses of the Senate, but only to certain ones. More specifically, the court held that the President's authority under the Clause is restricted to *inter*-session recesses (*i.e.*, recesses that occur between the end of one enumerated session of Congress and the beginning of the next).

App., *infra*, 18a-35a. Thus, the court held that the President has no power to make recess appointments during *intra*-session recesses (*i.e.*, recesses that take place during the course of such a session).

The court of appeals inferred the limitation to intersession recesses principally from the fact that the Recess Appointments Clause authorizes the President to fill vacancies during "the Recess" of the Senate. The court reasoned that the use of a definite article ("the," rather than "a") and a singular noun ("Recess," rather than "Recesses"), indicated that the Framers intended to confine the recess-appointment power to a specific recess rather than apply it to recesses as a class. App., *infra*, 19a. In the court's view, the specific recess that the Framers must have had in mind was the recess that occurs between one enumerated session of the Senate and the next. *Id.* at 20a-21a. The court recognized that Presidents had made many recess appointments based on a longstanding interpretation that the Clause applies to intra-session recesses as well as inter-session ones, but the court deemed it more significant that there had been no intra-session recess appointments before the Civil War and few until the Second World War. *Id.* at 23a. The court acknowledged that "intrasession recesses of significant length may have been far less common in those early days than today," but it concluded that the early dearth of intra-session recess appointments reflected "an assumed *absence* of the power to make such appointments." *Id.* at 24a (internal quotation marks and alterations omitted). The court also expressed concern that if Presidents could make recess appointments during intra-session recesses, they could evade the Senate's advice-and-consent function by waiting until an intrasession recess to make appointments. *Id.* at 26a.

b. Although the court of appeals' holding that the Recess Appointments Clause is limited to inter-session recesses was "sufficient to compel a decision vacating the Board's order," App., *infra*, 35a, the court proceeded to decide another question about the scope of the President's recess-appointment authority. The court held that, even during an inter-session recess, the President may not fill a vacancy unless that vacancy first arose during that same recess. *Id.* at 35a-52a.

The court of appeals reasoned that a vacancy "may happen during the Recess of the Senate" only when it arises during the inter-session recess. App., *infra*, 35a. The court rejected the Executive's longstanding interpretation that "happen" is better understood to mean "happen to exist" rather than "arise," asserting that such an interpretation would render superfluous the phrase "that may happen" and could enable the President to evade the Senate's role in the confirmation process. *Id.* at 35a, 36a, 37a. The court read the early history of recess appointments as supporting its view that only vacancies arising during a recess may be filled by recess appointments. *Id.* at 38a-41a. Although it acknowledged that the current statute relating to payment of recess appointees reflects Congress's acquiescence in the President's construction of the Clause, the court believed that earlier legislation enacted during the Civil War (and long since revised) reflected a repudiation of that interpretation. *Id.* at 42a-43a. The court suggested that the practical problems associated with its interpretation could be solved by legislation authorizing expanded use of "acting" officers. *Id.* at 44a-45a.

The court of appeals further held that even if a vacancy arises during a recess, and even if the recess is an inter-session one, the President still may not fill the

vacancy temporarily through a recess appointment unless he acts during the same recess in which the vacancy arose. App., *infra*, 51a. The court of appeals derived that additional limitation from the final portion of the Recess Appointments Clause, which provides that the commission of a recess appointee "shall expire at the End of [the Senate's] next Session." The court reasoned that the "next Session" can refer only to the session that follows the recess in which the vacancy arises, which, it believed, presupposes that the vacancy is being filled during that recess rather than any later one. *Ibid.*

c. Applying its construction of the Recess Appointments Clause to the President's January 2012 recess appointments to the Board, the court of appeals concluded that none of the vacancies had arisen during an inter-session recess and that none was filled during the recess in which the vacancy arose. App., *infra*, 34a-35a, 46a-47a. Finding that the Board lacked a valid quorum when it issued its final order in this case, the court vacated that order. *Id.* at 35a, 52a, 53a.

d. One member of the panel, Judge Griffith, concurred in part and concurred in the judgment. App., *infra*, 54a-55a. Judge Griffith agreed with the other members of the panel that the Recess Appointments Clause is confined to inter-session recesses. *Id.* at 54a. He declined, however, to decide whether the Clause is limited to vacancies that first arise during a recess. He noted that the Executive has maintained since the 1820s that the President may fill all vacancies that happen to exist during a recess, and he stated that a court should not repudiate such a longstanding interpretation of the Constitution by the Executive unless necessary to the disposition of the case. *Id.* at 54a-55a

5. Petitions for review and cross-applications for enforcement of many Board orders are currently pending before various courts of appeals, including the D.C. Circuit. See 29 U.S.C. 160(f) (permitting any person aggrieved by final order of the Board to petition for review in the circuit where the unfair labor practice is alleged to have occurred, where the aggrieved person resides or transacts business, or in the D.C. Circuit). After its decision in this case, the D.C. Circuit issued orders in numerous other NLRB cases pending in that court. Those orders held proceedings in abeyance pending further order. See, *e.g.*, *Alden Leeds, Inc.* v. *NLRB*, No. 11-1267 (order filed Feb. 19, 2013); *Sands Bethworks Gaming, LLC* v. *NLRB*, No. 12-1240 (order filed Jan. 25, 2013). Those cases remain in abeyance.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision would dramatically curtail the scope of the President's authority under the Recess Appointments Clause. Before that decision, Executive practice had long been predicated on the understanding that the Recess Appointments Clause authorizes the President to fill vacancies that exist during a recess of the Senate, regardless of whether the recess occurs between two enumerated sessions of Congress or during a session, and regardless of when the vacancies first arose. The decision below also conflicts with the decisions of three other federal courts of appeals and with the central objects of the Recess Appointments Clause. It would deem invalid hundreds of recess appointments made by Presidents since early in the Nation's history. It potentially calls into question every order issued by the National Labor Relations Board since January 4, 2012, and similar reasoning could threaten past and future decisions of other federal

agencies. Review of the court's constitutional holdings is warranted.

A. The President's Recess-Appointment Authority Is Not Confined To Inter-session Recesses

As the court of appeals acknowledged (App., *infra,* 30a), in holding that the President's recess-appointment authority cannot be exercised during an intra-session recess, the court created a square conflict with the Eleventh Circuit's decision in *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1226 (2004) (en banc) (upholding appointment of Article III judge made during February 2004 recess), cert. denied, 544 U.S. 942 (2005). The decision below is inconsistent with the proper reading of the Recess Appointments Clause and with literally hundreds of previous recess appointments going back many decades.

1. Legislative bodies such as the Senate characteristically enter into a recess in one of two ways. When a legislature adjourns *sine die* (*i.e.*, without specifying a day for its return), it thereby ends its current session; the following recess, which lasts until the beginning of the next session, is commonly known as an *inter*-session one. App., *infra*, 47a-49a; Henry M. Robert, *Pocket Manual of Rules of Order for Deliberative Assemblies* § 42, at 109-110, § 63, at 169-170 (1885). When a legislature instead adjourns to a specified date, the business of the current session typically resumes when the legislature reconvenes, and the intervening recess is commonly known as an intra-session one.

The court of appeals' decision to exclude intra-session recesses from the Recess Appointments Clause is inconsistent with the text and purposes of the Clause itself, with the long-held understandings of the President and

the Senate, and with many decades of actual practice by the political Branches.

a. The constitutional text provides that the President may fill vacancies during "the Recess of the Senate." That text "does not differentiate expressly between inter- and intrasession recesses." *Evans*, 387 F.3d at 1224. As understood both at the time of the Framing and today, a "recess" is a "period of cessation from usual work." 13 *Oxford English Dictionary* 322-323 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) (defining "recess" as a "[r]emission or suspension of business or procedure"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. "recess" (1755) (similar); *Evans*, 387 F.3d at 1224-1225. That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

In the legislative context, the Founding generation understood that the term "recess" included both inter- and intra-session recesses. That term was used to describe both kinds of breaks in British Parliamentary practice. See, *e.g.*, 13 *OED* 323 (quoting reference to House of Commons request about an impending "Recess of this Parliament" that was intra-session); 33 H.L. Jour. 464 (Nov. 26, 1772) (King's reference to a "Recess from Business" that was inter-session); Thomas Jefferson, *A Manual of Parliamentary Practice* § LI (2d ed. 1812) (describing a Parliamentary "recess by adjournment" as one occurring during an ongoing session). American legislative practice conformed to that understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States "in *the recess* of Congress."

Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1 (emphasis added). The one occasion on which that authority was exercised was an intra-session recess.[3] Similarly, the Pennsylvania and Vermont Constitutions each authorized the state Executive to issue a trade embargo "in the recess" of the legislature. See Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. II, § XVIII. Those provisions were both invoked during intra-session legislative recesses.[4] And when the Constitutional Convention of 1787 adjourned on July 26 until August 6, some delegates, including the President of the Convention, referred to that intra-session period as "the recess."[5]

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[3] Annual sessions of the Continental Congress began on the first Monday in November, see Articles of Confederation of 1781, art. V, but the relevant recess occurred when Congress scheduled its adjournment to end earlier, on October 30, 1784. See 26 *J. Continental Cong. 1774-1789*, at 295-296 (Gaillard Hunt ed., 1928); 27 *id.* at 555-556.

[4] See, *e.g.*, 11 *Minutes of the Supreme Executive Council of Pennsylvania* 545 (Theo. Fenn & Co., 1852) (Aug. 1, 1778 embargo); 1 *J. of the H.R. of Pa.* 209-211 (John Dunlap ed., 1782) (adjourning from May 25, 1778 to September 9, 1778); 2 *Records of the Governor and Council of the State of Vermont* 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 *State Papers of Vermont* 235 (P.H. Gobie Press, Inc., 1924) (adjourning from April 16, 1781 to June 13, 1781). Neither recess was preceded by a *sine die* adjournment or its equivalent. In both cases, the next annual legislative session did not commence until October. See Pa. Const. of 1776, § 9; Vt. Const. of 1777, Ch. II, § VIII.

[5] See 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1937) (letter from George Washington to John Jay; regretting Washington's inability to come to New York "during the recess" because his carriage was being repaired); *id.* at 191 (published version of Luther Martin's speech to the Maryland legislature; referring to matters he had wished to pursue "during the recess of the convention"); see also 2 *id.* at 128 (noting the adjournment).

b. Including intra-session recesses within the scope of the Recess Appointments Clause advances its central purposes. When the Senate is in session, the power to fill vacant offices is shared by the President and the Senate. The Recess Appointments Clause was meant to ensure that vacant offices may be filled, albeit temporarily, when the Senate is unavailable to offer its advice and consent to appointments to federal office, while freeing the Senate from the obligation of being "continually in session for the appointment of officers." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause also enables the President to meet his continuous constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, since the President cannot exercise that authority "alone and unaided," but requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135 (Jonathan Elliot ed., 2d ed. 1836) (Archibald Maclaine's explanation that the power "to make temporary appointments * * * can be vested nowhere but in the executive, because he is perpetually acting for the public").

The Senate is no more available to provide its advice and consent during an intra-session recess, and the President is no less in need of officers to fulfill his constitutional obligation, than during an inter-session recess. Indeed, the need to fill vacancies may be even greater during intra-session recesses; in recent decades, the Senate's intra-session recesses have often lasted longer than its inter-session recesses. See S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 529-538 (2011) (*Congressional Directory*), www.gpo.gov/

fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf (listing recesses during each session of Congress); see also *Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken "zero-day intersession recesses" as well as "intrasession recesses lasting months").

By excluding intra-session recesses from the scope of the President's recess-appointment authority, the court of appeals' interpretation creates periods of potentially significant duration in which there is no power to fill vacant offices, not even temporarily, no matter how long the recess or how great the need that an office be filled. The Recess Appointments Clause was adopted to eliminate, rather than permit, such lacunae.

c. The Senate and the President have long adopted a functional approach to determining when the Senate is in "recess" for purposes of the Recess Appointments Clause. In 1905, the Senate charged its Judiciary Committee with determining "[w]hat constitutes a 'recess of the Senate.'" S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905). The committee concluded that the word "recess" is used "in its common and popular sense" and that it means

> the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 1, 2. The Senate still regards its 1905 Judiciary Committee report as an authoritative construction of the

term "recess."[6] In 1921, Attorney General Daugherty relied on that report and adopted the same considerations for determining whether a "recess" exists for purposes of the Clause. See 33 Op. Att'y Gen. 20, 24-25 (1921). An intra-session recess of sufficient length readily satisfies that functional approach. And, since the 1921 Attorney General opinion, executive and legislative officers have repeatedly affirmed the understanding that intra-session recess appointments are valid. See, *e.g.*, 41 Op. Att'y Gen. 463, 466-469 (1960); 20 Op. Off. Legal Counsel 124, 161 (1996); 13 Op. Off. Legal Counsel 271, 272-273 (1989); 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 28 Comp. Gen. 30, 34-37 (1948).

d. Actual practice reflects the foregoing considerations. Presidents have apparently made more than 500 recess appointments during intra-session recesses, including appointments of three cabinet secretaries, five court of appeals judges, ten district court judges, a Director of Central Intelligence, a Chairman of the Federal Reserve, numerous members of multi-member boards, and holders of a variety of other critical government posts. See Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 3-4, 5-31 (Apr. 23, 2004) (identifying 177 intra-session recess appointments before 1981); see also Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, at 4-28 (Feb. 4, 2013), http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf (identi-

[6] See S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 947 & n.46 (1992).

fying 329 intra-session recess appointments since January 20, 1981).

As this Court has previously recognized, such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 690 (1929); *ibid*. ("[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.") (internal quotations marks and citation omitted).

2. The court of appeals' reasons for repudiating the political Branches' understanding of the Recess Appointments Clause's applicability during intra-session recesses are unpersuasive.

a. The court of appeals believed that the Clause's reference to "*the* Recess of the Senate" confines the Clause to inter-session recesses because it "suggests specificity." App., *infra*, 19a (emphasis added). But as the Eleventh Circuit explained, the word "the" can also be used to refer generically to a *class* of things (*e.g.*, "The pen is mightier than the sword") rather than a specific thing (*e.g.*, "The pen is on the table"). See *Evans*, 387 F.3d at 1224-1225 (citing dictionary usages).

Contrary to the D.C. Circuit's suggestion, App., *infra*, 32a, that usage is not a modern one that post-dates the Constitution. Indeed, other provisions of the Constitution itself use "the" when referring to something that

may happen on multiple occasions. For example, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, Cl. 5 (emphasis added)—a directive that necessarily applies to all Vice Presidential absences rather than any specific absence. Similarly, the Adjournment Clause provides that neither the House nor the Senate may adjourn for more than three days "during *the Session* of Congress" without the consent of the other body. Art. I, § 5, Cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to "the Session" cannot refer to only a single one.

The fact that the Recess Appointments Clause refers to "the Recess" rather than "the Recesses," App., *infra*, 19a, 22a, 27a, 32a, is equally inapposite. The Constitution repeatedly uses a singular noun, in conjunction with the article "the" to refer to any instance in a class of repeating occurrences—as demonstrated by the references to "the Absence" and "the Session" in the provisions quoted in the preceding paragraph. Moreover, the Senate has always been constitutionally required to have at least two enumerated sessions during each Congress (see Art. I, § 4, Cl. 2; Amend. XX, § 2), and in the eighteenth and nineteenth centuries, the Senate regularly had three or four enumerated sessions. See *Congressional Directory* 522-526. Thus, with respect to the Recess Appointments Clause, there is no correlation between the reference to "the Recess" and the multiple inter-session recesses that have occurred within every Congress.

b. The court of appeals also suggested that the Framers would not have provided for recess appointments to expire at the end of the Senate's "next" session

unless they expected the recess-appointment power to be invoked only between enumerated congressional sessions. See App., *infra*, 20a-21a. But the choice of the next session as a uniform terminal date for recess appointments says nothing about whether a recess can occur within a session. As noted above, intra-session recesses were a recognized legislative practice at the time of the Framing. If the Framers had meant to exclude them from the reach of the President's power under the Recess Appointments Clause, they would hardly have expressed that intention in such an oblique manner. And there are practical reasons why the Framers would have decided that the terms of all recess appointees—including intra-session appointees—would last until the end of the next session. For example, because some intra-session recesses have extended almost to the end of the enumerated session (see, *e.g.*, *Congressional Directory* 528, 533, 536), an intra-session recess appointment may occur near the close of a session. In such a situation, the Senate may well lack the opportunity to consider a permanent nomination before the session ends. Thus, having the end of the *next* session mark the end of each recess appointment ensures that the Senate will have a full opportunity to consider a permanent nominee before the office becomes vacant again.

c. The court of appeals noted that that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." App., *infra*, 19a-20a. As an historical matter, however, "adjournment" was typically used to refer to the *act* of adjourning, while "recess" was used to refer to the resulting *period* of cessation from work, a

distinction that is reflected in the Constitution itself.[7] But even if the Constitution were thought to use "adjournment," like "recess," to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive's position is entirely consistent with the possibility that "recess" is distinct from "adjournment." The Adjournment Clause makes clear that a legislative break of three days or less "during the Session of Congress" is still an "adjourn[ment]," Art. I, § 5, Cl. 4, but the Executive has long understood that such short intra-session breaks, which do not genuinely render the Senate unavailable to provide advice and consent, do not trigger the President's recess-appointment authority. See, *e.g.*, 33 Op. Att'y Gen. at 22; 16 Op. Off. Legal Counsel 15, 16 (1992).

d. The court of appeals made little effort to review the usage of "recess" during the period of the Framing, and the few historical materials that it did cite do not support its conclusions.[8] And rather than giving "great

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[7] Compare, *e.g.*, 1 *OED* 157 (using "adjournment" to refer to the "*act* of adjourning") (emphasis added), and U.S. Const. Art. I, § 7, Cl. 2 (Pocket Veto Clause) ("unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law"), with 13 *OED* 322 (using "recess" to refer to the "*period* of cessation from usual work") (emphasis added), and U.S. Const. Art. II, § 2, Cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate").

[8] The court of appeals cited a recess-appointment provision of the Revolutionary-era North Carolina constitution (N.C. Const. of 1776, Art. XX) and a later state-court decision, *Beard* v. *Cameron*, 7 N.C. (3 Mur.) 181 (1819), that supposedly "implie[d] that the provision was seen as differentiating between" the legislature's session and its recess. App., *infra*, 22a. But the language of the North Carolina provision differs significantly from that of the Recess Appointments Clause. Moreover, the suit in the cited state-court case was intended to allow the state supreme court to address whether the Governor

weight" (*The Pocket Veto Case*, 279 U.S. at 689) to the longstanding practice of Presidents making intra-session recess appointments, the court of appeals dismissed that body of practice on the ground that no intra-session recess appointment had been documented before 1867. App., *infra*, 23a-25a. But until the Civil War, there were no intra-session recesses longer than 14 days, and only a handful that exceeded three days. See *Congressional Directory* 522-525. Thus, the simplest explanation for the early rarity of intra-session recess appointments is that intra-session recesses of a length that might have furnished an occasion for a recess appointment were themselves relatively uncommon before the mid-twentieth century. See *id*. at 525-528.

e. Finally, the court of appeals speculated that Presidents could use intra-session recess appointments to evade the Senate's advice-and-consent role. App., *infra*, 26a. Actual practice disposes of that speculation. As explained above, the President's authority to make intra-session recess appointments has been accepted by both political Branches for nearly a century. Yet the kind of evasion posited by the court of appeals has never materialized. To the contrary, Presidents routinely seek Senate confirmation when filling vacant offices, and of course have a strong practical incentive to do so, because recess appointments are only temporary.

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could grant a temporary commission to fill a vacancy occasioned by the death of a judge that allegedly occurred while the General Assembly was in session. 7 N.C. (3 Mur.) at 181-182. The case was decided on an unrelated procedural ground. *Id.* at 184-186. It therefore did not answer that question. Nor did it imply anything about whether the state appointment power could be exercised during intra-session recesses.

The court of appeals' interpretation, however, would allow the Senate to disable the President from making recess appointments even when the Senate is unavailable to give its advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain at the end of the session. For example, the second session of the 82d Congress ended on July 7, 1952, when Congress adjourned *sine die*, and the President was able to make recess appointments from that date until January 3, 1953, when the next session of Congress began pursuant to the Twentieth Amendment. *Congressional Directory* 529. If the Senate had instead adjourned to a date immediately before the next session, such as January 2, the recess would have been nearly identical in length, but it would have been an intra-session recess, during which the President would have been powerless to make recess appointments under the D.C. Circuit's view, despite the Senate's absence of nearly six months. The Framers could hardly have intended such a result.

B. The President May Fill A Vacancy That Exists During A Recess Of The Senate, Even If The Vacancy Did Not First Arise During That Recess

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. Art. II, § 2, Cl. 3. For almost two centuries, the Executive has construed the phrase "that may happen" as referring to vacancies that exist during a recess of the Senate, and the President has made numerous appointments on that basis. Before the decision below, that construction had been approved by three courts of appeals, two of them sitting en banc. See *Evans*, 387 F.3d at 1226-1227 (11th Cir.) (en banc); *United States* v.

Woodley, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). The D.C. Circuit, however, rejected that construction, instead holding that a vacancy that first arises during a session of the Senate and remains unfilled when the Senate enters a recess may not be filled by the President during that recess, no matter how long the recess lasts—and even if the vacancy arose too late in the Senate's session to allow for a pre-adjournment nomination and confirmation. This Court should review and reverse that erroneous holding as well.

1. In 1823, Attorney General Wirt addressed this question in an opinion to President Monroe. 1 Op. Att'y Gen. 631. Wirt recognized that "happen" may be read to "mean 'happen to take place'" or that it "may mean, also, * * * 'happen to exist.'" *Id.* at 631-632. He concluded that the latter reading is most consonant with the "spirit, reason, and purpose" of the Constitution, which "was to keep these offices filled." *Id.* at 632, 634. He thus opined that "all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled." *Id.* at 633. Subsequent Attorneys General (and Assistant Attorneys General) repeatedly endorsed Wirt's conclusion. See, *e.g.*, 41 Op. Att'y Gen. at 468; 13 Op. Off. Legal Counsel at 272; see also *Allocco*, 305 F.2d at 713 (listing opinions). Moreover, while there had been earlier debate about which construction was correct,[9]

[9] In the 1790s, Attorney General Edmund Randolph did not adopt the view that Wirt later articulated, see App., *infra*, 39a, but President John Adams did, see 8 *The Works of John Adams* 632-633 (Charles Francis Adams ed., 1853) (letter from Adams stating he had

some Executive Branch practice before 1823 was consistent with Wirt's view, including two recess appointments made by President Washington[10] and one made by President Madison.[11] The Executive's long-held interpretation is entitled to "great weight" in "determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 688-690.

Unlike the court of appeals' view, the Executive's construction also furthers the Recess Appointment Clause's basic object of ensuring a genuine opportunity

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"no doubt that it is my right and my duty" to make a recess appointment to an office that had first become vacant while the Senate was in session); *id.* at 647 (subsequent letter noting "a difference of opinion concerning the construction of the constitution" and, finding "no necessity for an immediate appointment," agreeing "to suspend it for the present, perhaps till the meeting of the Senate").

[10] In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by a statute enacted in April 1792. The vacancy arose when the statute was first passed, and was then filled during a later recess after at least one intervening session. 27 *The Papers of Thomas Jefferson* 191-192 (John Catanzariti ed., 1997); S. Exec. J., 3d Cong., 1st Sess., 142-143 (1793) (indicating that the office of Engraver was previously unfilled); Act of Apr. 2, 1792, ch. 16, 1 Stat. 246. In October 1796, Washington recess-appointed William Clarke to be the United States Attorney for Kentucky, even though the vacancy had gone unfilled for nearly four years. U.S. Dep't of State, *Calendar of the Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 65-73 (1978).

[11] See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 400-401 (2005). There is also some evidence to support appointments by President Jefferson that would be inconsistent with the court of appeals' interpretation. *Id.* at 391-400.

for vacancies to be filled, even if temporarily, at all times. If an unanticipated vacancy arises shortly before the Senate begins a recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination while the Senate remains in session. Moreover, the relatively slow speed of long-distance communication in the eighteenth century meant that the President might not even have learned of such a vacancy until after the Senate's recess had begun. See 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant during a months-long recess merely because news of the death did not reach the seat of government until the Senate was already in recess. "If the [P]resident needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." Michael Herz, *Abandoning Recess Appointments?: A Comment on Harnett (and Others)*, 26 Cardozo L. Rev. 443, 445-446 (2005).

The established construction of the Clause also accords with the durational nature of a vacancy. Although the event that *causes* a vacancy, such as a death or resignation, will "happen" at a particular moment, the resulting vacancy itself will continue to "happen" until it is filled. Accord 2 Johnson, *Dictionary* s.v. "vacancy" (defining "vacancy" in 1755 as the "[s]tate of a post or employment when it is unsupplied"); see 12 Op. Att'y Gen. 32, 34-35 (1866). In common parlance, an event that persists over a period of time is said to "happen" throughout that period, not merely at the point it began. Thus, it is reasonable to say that World War II "hap-

pened" during the 1940s, even though the war began on September 1, 1939.

2. The court of appeals suggested that the Executive's longstanding construction renders the phrase "that may happen" superfluous. App., *infra*, 36a. But that is not so. Without that phrase, the Recess Appointments Clause could have been read to permit the President to fill up known *future* vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing the text to refer to vacancies that "happen to exist" (1 Op. Att'y Gen. at 633) confines the President to filling vacancies already in existence during the recess.

Moreover, the court of appeals' holding creates serious textual difficulties of its own. The Clause gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, Cl. 3. If the phrase "during the Recess of the Senate" were read to modify the term "happen" and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and it would not limit the *time* when the President may exercise his "Power to fill up" those vacancies through granting commissions. As a result, the President would retain his power to fill a vacancy that arose during a recess even after the Senate returned from that recess—an interpretation that cannot possibly be correct. See 12 Op. Att'y Gen. at 38-39 (criticizing the "happen to arise" interpretation for this reason). By contrast, under the interpretation long since adopted by many Presidents, the phrase "during the Recess of the Senate" places a temporal limit on the President's "Power to fill up" a vacancy.

The court of appeals also dismissed evidence of Congress's acquiescence in the Executive's interpretation and practice on the ground that Congress had repudiated that interpretation in an 1863 pay statute. App., *infra*, 42a-43a. But far from rejecting the Executive's interpretation, the 1863 statute acknowledged it. See 16 Op. Att'y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. And Congress later amended the statute to provide conditions in which even such appointees are to be paid. See Act of July 11, 1940, ch. 580, 54 Stat. 751.

At a practical level, the court of appeals recognized that its interpretation could leave offices vacant for potentially lengthy periods, but it suggested that Congress could solve that problem by providing more broadly than it has for the use of "acting" officials. App., *infra*, 44a-45a. But the very existence of the Recess Appointments Clause shows that the Framers did not believe it would be sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some offices, such as Article III judgeships, cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced, for significant periods of time.

3. Having held that the President may fill only vacancies that *first arise* during an *inter*-session recess, the court of appeals further restricted even that drastically narrowed authority by holding that the President may fill such a vacancy only during the same recess in

which it first arises. App., *infra*, 51a. In doing so, the court looked to the portion of the Recess Appointments Clause that provides for the temporary terms of recess appointees to expire "at the End of [the Senate's] next Session." The court construed "next Session" to mean the next session after the recess in which the vacancy arose, which would effectively preclude filling the vacancy through an appointment in a subsequent recess. *Ibid.*

The phrase "next Session," however, refers to the next session after the President fills a vacancy by granting a commission. That reading is both long accepted and grammatically straightforward. The constitutional text ties the expiration of the appointments to the act of "granting Commissions," not to the "happen[ing]" of the vacancy. And if "happen" means "happen to exist," then "next Session" must refer to the "next Session" after the filling of the vacancy, because the vacancy itself may "happen to exist" during more than one session. That conclusion is especially appropriate because a variety of reasons—including the press of other urgent executive and legislative business—may prevent the President from making, or the Senate from acting upon, a nomination by the end of the "next Session" after a vacancy arises. There was accordingly good reason to tie the duration of a recess appointment to the time of appointment, rather than the time the vacancy first arises. Nothing in the text of the Clause supports the court of appeals' contrary interpretation.

C. The Court Of Appeals' Decision Would Have Serious And Far-Reaching Consequences

The court of appeals' decision would deny the President the authority to fill vacant offices during intra-session recesses—which account for much of the time that the modern Senate is not in session—and would

further preclude him from filling many vacancies even during inter-session recesses. That decision repudiates understandings of the Recess Appointments Clause that have been maintained and relied on by the Executive for most of the Nation's history. The limitations imposed by the court of appeals would render many of the recess appointments since the Second World War unconstitutional.

The decision also threatens a significant disruption of the federal government's operations—including, most immediately, those of the National Labor Relations Board. The decision potentially calls into question every final decision of the Board since January 4, 2012. And, because many of the Board's members have been recess-appointed during the past decade, it could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit *or* the D.C. Circuit. See 29 U.S.C. 160(f). Thus, the potential effects of the decision below are limited by neither time nor geography.

Moreover, those effects can also be expected to extend to a wider range of federal agencies and offices, because venue lies in the District of Columbia in virtually all civil actions seeking review of federal agency actions. See, *e.g.*, 28 U.S.C. 1391(e)(1) (Supp. V 2011), 28 U.S.C. 2343. If the decision below is allowed to stand, almost any federal officer who received a recess appointment during an intra-session recess, or who was appointed to fill a vacancy that did not first arise during the recess in which the appointment was made, could have his actions challenged in the D.C. Circuit on the ground that his appointment was unconstitutional and his official actions were *ultra vires*.

Review by this Court is warranted to resolve the circuit conflict created by the decision below, to remove the resulting constitutional cloud over the acts of past and present recess appointees, and to restore the President's capacity to fill vacant offices temporarily when the Senate is unavailable to give its advice and consent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1115
Consolidated with 12-1153

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760, INTERVENOR

Argued: Dec. 5, 2012
Decided: Jan. 25, 2013

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Before: SENTELLE, *Chief Judge*, HENDERSON and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* GRIFFITH.

SENTELLE, *Chief Judge*: Noel Canning petitions for review of a National Labor Relations Board ("NLRB" or "the Board") decision finding that Noel Canning violated section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5), by refusing to reduce to writing and execute a collective bargaining agreement reached with Teamsters Local 760 ("the Union"). *See Noel Canning, A Division of the Noel Corp.*, 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012) ("Board Decision"). NLRB cross-petitions for enforcement of its order. On the merits of the NLRB decision, petitioner argues that the Board did not properly follow applicable contract law in determining that an agreement had been reached and that therefore, the finding of unfair labor practice is erroneous. We determine that the Board issuing the findings and order could not lawfully act, as it did not have a quorum, for reasons set forth more fully below.

I. INTRODUCTION

At its inception, this appears to be a routine review of a decision of the National Labor Relations Board over which we have jurisdiction under 29 U.S.C. § 160(e) and (f), providing that petitions for review of Board orders may be filed in this court. The Board issued its order on February 8, 2012. On February 24, 2012, the company filed a petition for review in this court, and the Board filed its cross-application for enforcement on March 20, 2012. While the posture of the petition is routine, as it developed, our review is not. In its brief before us, Noel Canning (along with a movant for status as intervenor whose motion we will

dismiss for reasons set forth hereinafter) questions the authority of the Board to issue the order on two constitutional grounds. First, petitioner asserts that the Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative recess appointments which were made when the Senate was not in recess. Second, it asserts that the vacancies these three members purportedly filled did not "happen during the Recess of the Senate," as required for recess appointments by the Constitution. U.S. Const. art. II, § 2, cl. 3. Because the Board must have a quorum in order to lawfully take action, if petitioner is correct in either of these assertions, then the order under review is void *ab initio*. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Before we can even consider the constitutional issues, however, we must first rule on statutory objections to the Board's order raised by Noel Canning. It is a well-settled principle of constitutional adjudication that courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997). We must therefore decide whether Noel Canning is entitled to relief on the basis of its nonconstitutional arguments before addressing the constitutional question. Noel Canning raises two statutory arguments. First,

it contends that the ALJ's conclusion that the parties in fact reached an agreement at their final negotiation session is not supported by substantial evidence. Second, it argues that even if such an agreement were reached, it is unenforceable under Washington law. We address each argument in turn.

A. The Sufficiency of the Evidence

Refusal to execute a written collective bargaining agreement incorporating terms agreed upon during negotiations is an unfair labor practice under section 8(a)(1) and (5) of the NLRA. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941). Whether the parties reached an agreement during negotiations is a question of fact. *See NLRB v. Int'l Bhd. of Elec. Workers*, 748 F.2d 348, 350 (8th Cir. 1984); *NLRB v. Roll & Hold Div. Area Transp. Co.*, 957 F.2d 328, 331 (7th Cir. 1992). We therefore must affirm the Board's conclusion that an agreement was in fact reached if that conclusion is supported by substantial evidence. 29 U.S.C. § 160(e).

Noel Canning and the Union had in the past enjoyed a long collective bargaining relationship, but the parties were unable to reach a new agreement before their most recent one expired in April 2010. Negotiations began in June 2010. By the time the parties met for their final negotiation session in December 2010, all issues save wages and pensions had been resolved. According to notes taken by Union negotiators at the parties' final negotiating session, the parties agreed to present two alternative contract proposals to the Union membership: one preferred by Noel Canning man-

agement and the other by the Union. Each proposal included wage and pension increases but allocated the increases differently. The notes reveal that the Union proposal put no limit on the membership's right to decide how much of the $0.40 per hour pay increase to allocate to its pension fund. According to the notes and Union witnesses, the parties agreed that both proposals would be submitted to the Union membership for a ratification vote and that the parties would be bound by the outcome of that vote. Union negotiators testified that after the parties read aloud the terms of the two proposals, Noel Canning's president stood and said "let's do it." Deferred Appendix 78. A Noel Canning officer agreed to email the terms to the Union the next day. After the company agreed to allow the Union to use a company conference room to hold the vote, the negotiators shook hands and departed.

The next day, Noel Canning management emailed the Union the wage and pension terms of the two proposals. According to the email, however, the Union proposal capped at $0.10 the amount of the $0.40 pay increase that the membership could devote to its pension fund. The email thus conflicted with the Union negotiators' notes, which left the allocation question entirely to the membership. When the chief Union negotiator, Bob Koerner, called Noel Canning's president to discuss the discrepancy, the president responded that since the agreement was not in writing, it was not binding. The vote took place anyway, and the membership ratified the Union's preferred proposal, which allocated the entire pay increase to the pension

fund. Noel Canning posted a letter informing the Union that the company considered the ratification vote to be a counteroffer, which the company rejected, and declared the parties to be at an impasse. Noel Canning subsequently refused to execute a written agreement embodying the terms ratified by the Union.

The Union filed an unfair labor practice charge premised on Noel Canning's refusal to execute the written agreement. After a two-day hearing, the ALJ determined that the parties had in fact achieved *consensus ad idem* as to the terms of the Union's preferred proposal and that Noel Canning's refusal to execute the written agreement constituted an unfair labor practice under section 8(a)(1) and (5) of the NLRA. The ALJ ordered Noel Canning to sign the collective bargaining agreement. Noel Canning timely filed exceptions to the ALJ's decision, and the Board affirmed.

Unsurprisingly, the parties' testimony at the ALJ hearing conflicted over whether the parties in fact agreed to the terms of the Union proposal. The ALJ's decision thus rested almost entirely on his determination of the witnesses' credibility. Assessing the conflicting testimony, the ALJ determined that because the Union witnesses' testimony was corroborated by contemporaneous notes taken during the December 2010 negotiation session, the Union's witnesses were credible. In contrast, he determined that Noel Canning's witnesses were not credible because they neither "produced notes of the meeting [n]or explained why no notes were available" and because their

testimony was "abbreviated, conclusionary, nonspecific, and unconvincing." Board Decision at 7 (ALJ Op.).

We are loathe to overturn the credibility determinations of an ALJ unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation marks omitted). Here, the ALJ chose the corroborated testimony of Union negotiators over the unsupported testimony of Noel Canning employees. And given undisputed testimony that at least one Noel Canning representative took notes of the meeting, the ALJ weighed Noel Canning's failure to corroborate its testimony against it. As we noted, the ALJ also found Noel Canning's witnesses' testimony to be unspecific and abbreviated. In *Monmouth Care Center v. NLRB*, we found no reason to set aside a credibility determination where "the ALJ credited the testimony of the union's negotiator over that of the petitioners' representatives . . . based on a combination of testimonial demeanor and a lack of specificity and internal corroboration for the petitioners' claims." 672 F.3d 1085, 1091 (D.C. Cir. 2012). The ALJ made a nearly identical determination here, and we discern no reason to disturb it.

Noel Canning nevertheless claims that Koerner's testimony is plagued by inconsistencies. But the inconsistencies and contradictions it identifies are either irrelevant or merely the result of the competing testimony of the two parties' witnesses. There is nothing in the Union testimony—corroborated by contempo-

raneous notes—that hints at hopeless incredibility or self-contradiction.

Noel Canning thus relies on what it alleges to be an inconsistency between Koerner's testimony and his affidavit. The affidavit, which is not in the record, apparently contained the following sentence, referring to the parties' tentative agreement as "TA": "I was voting the contract on Wednesday and that I would vote what we TA'd during the December 8th meeting —noting different than TA'd." Deferred Appendix 74. When asked at the ALJ hearing if he saw any errors in his affidavit, Koerner claimed he saw none but struggled to explain what the language meant. Noel Canning contends that the affidavit is an explicit admission that Koerner presented an offer to the Union that was materially different from the one agreed upon by the parties and therefore contradicts his testimony. The ALJ rejected Noel Canning's interpretation, concluding that the sentence suffered from a typographical error—"noting" should have been "nothing"—and that the error accounted for the witness's inability to explain the affidavit's meaning. Board Decision at 5 n.8 (ALJ Op.).

We conceive of no reason to disagree. As written, the language of the affidavit is confusing and becomes intelligible only if the typographical error pointed out by the ALJ is corrected. Moreover, the ALJ specifically determined that the witness was confused by the affidavit, not that he was trying to conceal deception, as Noel Canning contends. We are "ill-positioned to second-guess" that determination. *W.C. McQuaide,*

Inc. v. NLRB, 133 F.3d 47, 53 (D.C. Cir. 1998). And even assuming that Noel Canning's reading is correct, it does not support the company's chief argument before the Board—that the parties failed to reach *any* agreement at the December 2010 negotiation session —because even the affidavit evinces that the parties reached some sort of agreement. Given the deference we owe to the ALJ's credibility determinations, the consistency between the negotiators' notes and the deal the membership approved, and the lack of any evidence otherwise suggesting that Koerner was an incredible witness, this case is not the rare one in which we will overturn an ALJ's credibility determination. The Board's decision was therefore supported by substantial evidence.

B. The Enforceability of the Contract

We also agree with the Board that we lack jurisdiction to consider Noel Canning's choice of law argument. Section 10(e) of the NLRA forbids us from exercising jurisdiction to hear any "objection that has not been urged before the Board." 29 U.S.C. § 160(e); *see also Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1329-30 (D.C. Cir. 2012). The ALJ specifically rejected Noel Canning's argument that he should apply Washington state law to decide whether the contract could be enforced. In its exceptions to the Board, however, Noel Canning did not mention Washington law. Although Noel Canning contended that the ALJ incorrectly determined that the parties had in fact reached *consensus ad idem* during negotiations, it

nowhere argued that the ALJ made an incorrect choice of law to govern the contracts issue.

"While we have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board, we have required, at a minimum, that the ground for the exception be evident by the context in which the exception is raised." *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) (internal quotation marks omitted). Nothing in Noel Canning's exceptions even hints that it objected to the application of federal law. On the contrary, it conceded to the Board that "[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations." Deferred Appendix 100. We therefore lack jurisdiction to consider Noel Canning's state-law argument because its objections were not "adequate to put the Board on notice that the issue might be pursued on appeal." *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981). Having determined that Noel Canning does not prevail on its statutory challenges, consideration of the constitutional question is unavoidable, and we proceed to its resolution.

Because we agree that petitioner is correct in both of its constitutional arguments, we grant the petition of Noel Canning for review and deny the Board's petition for enforcement.

II. JURISDICTION

Although no party has questioned our jurisdiction to decide the constitutional issues raised in this petition, federal courts, being courts of limited jurisdiction, must assure themselves of jurisdiction over any controversy they hear, regardless of the parties' failure to assert any jurisdictional question. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984). We note at the outset that there is a serious argument to be made against our having jurisdiction over the constitutional issues. Section 10(e) of the NLRA, governing judicial review of the Board's judgments and petitions for enforcement, provides: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The record reflects no attempt by petitioner to raise the threshold issues related to the recess appointments before the Board. Our first question, then, is whether this failure to urge the objection before the Board comes within the exception for "extraordinary circumstances." We hold that it does.

We acknowledge that no governing precedent directly addresses this question. Nonetheless, there is instructive precedent from other circumstances and other similar administrative proceedings under other statutes. First, we note that in another administrative agency review, *Railroad Yardmasters of America v. Harris*, we held that a challenge to the authority of

the National Mediation Board on the basis that it had no quorum "present[ed] a question of power or jurisdiction and is open to the appellee even if not initially asserted before the Board." 721 F.2d 1332, 1338 (D.C. Cir. 1983). In *Railroad Yardmasters*, we relied on the Supreme Court's decision in *United States v. L. A. Tucker Truck Lines, Inc. Id.* at 1337-38 (discussing *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952)). In *L. A. Tucker Truck Lines*, the Court considered a challenge to the appointment of an examiner in an Interstate Commerce Commission proceeding. 344 U.S. at 35. Therein the Court stated in dicta that this was not a defect "which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." *Id.* at 38. In *L. A. Tucker Truck Lines*, the challenge was not to the Commission's power to act, but only its examiner's. We held in *Railroad Yardmasters* that the *L. A. Tucker Truck Lines* rejection of the challenge did not govern because in the case before us, "the appellee contend[ed] that the National Mediation Board had no power to act at all at a time when there were two vacancies on the Board." 721 F.2d at 1338. Because that challenge "present[ed] a question of power or jurisdiction . . . [it was] open to the appellee even if not initially asserted before the Board." *Id.*

The reasoning of *Yardmasters* is applicable here. As in *Yardmasters*, the objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns. We hold that they are

governed by the "extraordinary circumstances" exception to the 29 U.S.C. § 160(e) requirement and therefore are properly before us for review.

Admittedly, *Yardmasters* did not implicate our jurisdiction nor have we ever applied it to a jurisdictional exhaustion statute. But in *Natural Resources Defense Council v. Thomas*, we considered whether to apply *Yardmasters* to section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), a jurisdictional administrative exhaustion requirement. 805 F.2d 410, 428 & n.29 (D.C. Cir. 1986). Although we ultimately declined to apply it, we did so because the facts of the case did not involve the *Yardmasters* exception, not because *Yardmasters* does not apply to a jurisdictional exhaustion statute. *See id.* Confronted for the first time with facts that do trigger the *Yardmasters* exception in the context of a jurisdictional exhaustion statute, we hold that we may exercise jurisdiction under section 10(e) because a constitutional challenge to the Board's composition creates "extraordinary circumstances" excusing failure to raise it below.

In various circumstances, both this court and the Supreme Court have considered objections to the authority of the decisionmaker whose decision is under review even when those objections were not raised below. For example, the Supreme Court has stated, admittedly in dicta, that "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce," a reviewing court cannot enter an order of enforcement, such as the Board seeks in this case. *NLRB v. Cheney Cali-*

fornia Lumber Co., 327 U.S. 385, 388 (1946). It is true that petitioner's argument before us does not raise the Board's "travel[ing] outside the orbit of its authority" in precisely the same way as in *Cheney*. In that case, the Supreme Court addressed arguments concerning the scope of the Board's authority. Here, however, there is "no order to enforce" because there was no lawfully constituted Board. The *Cheney* order was "outside the orbit of authority" by reason of its scope. The present order is outside the orbit of the authority of the Board because the Board had no authority to issue any order. It had no quorum. *See generally New Process Steel*, 130 S. Ct. 2635. This, we hold, constitutes an extraordinary circumstance within the meaning of the NLRA.

We further find instructive our decision in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). In that case, we considered an objection to the Board's authority to subject a religious institution to the NLRA's collective bargaining requirements. *Id.* at 571. In agreeing with the petitioner in *Carroll College* that the Board had erred, we stated, "[t]he Board thus had no jurisdiction to order the school to bargain with the union, and we have authority to invalidate the Board's order even though the college did not raise its jurisdictional challenge below." *Id.* at 574. Although for different reasons, the petitioner here, just as in *Carroll College*, argues that the Board was without authority to enter the order under review. Just as in *Carroll College*, we hold that where the Board "had no jurisdiction" to enter the order, "we have authority to invalidate the Board's order even though

the [petitioner] did not raise its jurisdictional challenge below." *Id.*

III. THE UNDERLYING PROCEEDINGS

Petitioner is a bottler and distributor of Pepsi-Cola products and is an employer within the terms of the NLRA. As discussed, an NLRB administrative law judge concluded that Noel Canning had violated the NLRA. Board Decision at 8 (ALJ Op.). After Noel Canning filed exceptions to the ALJ's findings, a three-member panel of the Board, composed of Members Hayes, Flynn, and Block, affirmed those findings in a decision dated February 8, 2012. *Id.* at 1 (Board Op.).

On that date, the Board purportedly had five members. Two members, Chairman Mark G. Pearce and Brian Hayes, had been confirmed by the Senate on June 22, 2010. It is undisputed that they remained validly appointed Board members on February 8, 2012. *See* 156 Cong. Rec. S5,281 (daily ed. June 22, 2010).

The other three members were all appointed by the President on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3. *See Ctr. for Soc. Change, Inc.*, 358 N.L.R.B. No. 24, slip op. at 1, 2012 WL 1064641 (2012).

The first of these three members, Sharon Block, filled a seat that became vacant on January 3, 2012, when Board member Craig Becker's recess appointment expired. *See* 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012); Part IV.B, *infra*.

The second of the three members, Terence F. Flynn, filled a seat that became vacant on August 27, 2010, when Peter Schaumber's term expired. *See* 158 Cong. Rec. S582-83; 152 Cong. Rec. 17,077 (2006). The third, Richard F. Griffin, filled a seat that became vacant on August 27, 2011, when Wilma B. Liebman's term expired. *See* 158 Cong. Rec. S582-83; 152 Cong. Rec. 17,077.

At the time of the President's purported recess appointments of the three Board members, the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in *pro forma* sessions every three business days from December 20, 2011, through January 23, 2012. 157 Cong. Rec. S8,783-84 (daily ed. Dec. 17, 2011). The agreement stated that "no business [would be] conducted" during those sessions. *Id.* at S8,783. During the December 23 *pro forma* session, the Senate overrode its prior agreement by unanimous consent and passed a temporary extension to the payroll tax. *Id.* at S8,789 (daily ed. Dec. 23, 2011). During the January 3 *pro forma* session, the Senate acted to convene the second session of the 112th Congress and to fulfill its constitutional duty to meet on January 3. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012); *see* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

Noel Canning asserts that the Board did not have a quorum for the conduct of business on the operative

date, February 8, 2012. Citing *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), which holds that the Board cannot act without a quorum of three members, Noel Canning asserts that the Board lacked a quorum on that date. Noel Canning argues that the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3. Because we agree that the appointments were constitutionally invalid and the Board therefore lacked a quorum, we grant the petition for review and vacate the Board's order.

IV. ANALYSIS

It is undisputed that the Board must have a quorum of three in order to take action. It is further undisputed that a quorum of three did not exist on the date of the order under review unless the three disputed members (or at least one of them) were validly appointed. It is further agreed that the members of the Board are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. Finally, it is undisputed that the purported appointments of the three members were not

made "by and with the Advice and Consent of the Senate."

This does not, however, end the dispute. The Board contends that despite the failure of the President to comply with Article II, Section 2, Clause 2, he nonetheless validly made the appointments under a provision sometimes referred to as the "Recess Appointments Clause," which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3. Noel Canning contends that the putative recess appointments are invalid and the Recess Appointments Clause is inapplicable because the Senate was not in the recess at the time of the putative appointments and the vacancies did not happen during the recess of the Senate. We consider those issues in turn.

A. The Meaning of "the Recess"

Noel Canning contends that the term "the Recess" in the Recess Appointments Clause refers to the intersession recess of the Senate, that is to say, the period between sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President. The Board's position is much less clear. It argues that the alternative appointment procedure created by that Clause is available during intrasession "recesses," or breaks in the Senate's business when it is otherwise in a continuing session. The Board never states how short a break is too short, under its theory, to serve as

a "recess" for purposes of the Recess Appointments Clause. This merely reflects the Board's larger problem: it fails to differentiate between "recesses" and the actual constitutional language, "the Recess."

It is this difference between the word choice "recess" and "the Recess" that first draws our attention. When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008). Then, as now, the word "the" was and is a definite article. *See* 2 Samuel Johnson, A Dictionary of the English Language 2041 (1755) (defining "the" as an "article noting a *particular* thing" (emphasis added)). Unlike "a" or "an," that definite article suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said "the Recess," what they really meant was "a recess." This is not an insignificant distinction. In the end it makes all the difference.

Six times the Constitution uses some form of the verb "adjourn" or the noun "adjournment" to refer to breaks in the proceedings of one or both Houses of Congress. Twice, it uses the term "the Recess": once in the Recess Appointments Clause and once in the Senate Vacancies Clause, U.S. Const. art. I, § 3, cl. 2. Not only did the Framers use a different word, but none of the "adjournment" usages is preceded by the definite article. All this points to the inescapable conclusion that the Framers intended something spe-

cific by the term "the Recess," and that it was something different than a generic break in proceedings.

The structure of the Clause is to the same effect. The Clause sets a time limit on recess appointments by providing that those commissions shall expire "at the End of their [the Senate's] next Session." Again, the Framers have created a dichotomy. The appointment may be made in "the Recess," but it ends at the end of the next "Session." The natural interpretation of the Clause is that the Constitution is noting a difference between "the Recess" and the "Session." Either the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in "the Recess."

It is universally accepted that "Session" here refers to the usually two or sometimes three sessions per Congress. Therefore, "the Recess" should be taken to mean only times when the Senate is not in one of those sessions. *Cf. Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (interpreting terms "by reference to associated words"). Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate's engrossing clerk "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess." Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71.

Not only logic and language, but also constitutional history supports the interpretation advanced by Noel Canning, not that of the Board. When the Federalist Papers spoke of recess appointments, they referred to

those commissions as expiring "at the end of the ensuing session." The Federalist No. 67, at 408 (Clinton Rossiter ed., 2003). For there to be an "ensuing session," it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session—that is, when it was in "the Recess." Thus, background documents to the Constitution, in addition to the language itself, suggest that "the Recess" refers to the period between sessions that would end with the ensuing session of the Senate.

Further, the Supreme Court has used analogous state constitutional provisions to inform its interpretation of the Constitution. *See Heller*, 128 S. Ct. at 2802. For example, in *Collins v. Youngblood*, the Court considered several early state constitutions in discerning "the original understanding of the *Ex Post Facto* Clause" because "they appear to have been a basis for the Framers' understanding of the provision." 497 U.S. 37, 43 (1990). The North Carolina Constitution, which contains the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause's model, *see* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1770-72 (1984), supports the intersession interpretation. It provides:

> That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess,

> die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.

N.C. Const. of 1776, art. XX, *reprinted in* 7 Sources and Documents of United States Constitutions 406 (1978). This provision, like the Recess Appointments Clause, describes a singular recess and does not use the word "adjournment." And an 1819 North Carolina Supreme Court case dealing with this provision implies that the provision was seen as differentiating between "the session of the General Assembly" and "the recess of the General Assembly." *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819) (opinion of Taylor, C.J.).

The Board argues that "the Company's view would . . . upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments." Resp't. Br. at 13. However, the Board's view of "the established constitutional balance" is neither so well established nor so clear as the Board seems to think. In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent.

The interpretation of the Clause in the years immediately following the Constitution's ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a "critical tool of constitutional interpretation" because it reflects the "public understanding" of the text

"in the period after its . . . ratification." *Heller*, 128 S. Ct. at 2804-05. With respect to the Recess Appointments Clause, historical practice strongly supports the intersession interpretation. The available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified. Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2211 (1994). The first intrasession recess appointment probably did not come until 1867, when President Andrew Johnson apparently appointed one district court judge during an intrasession adjournment. *See* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 408-09 (2005). It is not even entirely clear that the Johnson appointment was made during an intrasession recess. *See id.* at 409 n.136.

Presidents made only three documented intrasession recess appointments prior to 1947, with the other two coming during the presidencies of Calvin Coolidge and Warren Harding. *See* Carrier, *supra*, at 2209-12, 2235; *see also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 5 (2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf ("2012 OLC Memo").

Whatever the precise number of putative intrasession recess appointments before 1947, it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an ap-

pointment, and for decades thereafter, such appointments were exceedingly rare. The Supreme Court in *Printz v. United States*, exploring the reach of federal power over the states, deemed it significant that the early Congress had not attempted to exercise the questioned power. 521 U.S. 898 (1997). Paralleling the Supreme Court's reasoning in *Printz*, we conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic "suggests an assumed *absence* of [the] power" to make such appointments. *Id.* at 908. Though it is true that intrasession recesses of significant length may have been far less common in those early days than today, *see* Carrier, *supra*, at 2211, it is nonetheless the case that the appointment practices of Presidents more nearly contemporaneous with the adoption of the Constitution do not support the propriety of intrasession recess appointments. Their early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage.

While the Board seeks support for its interpretation in the practices of more recent administrations, we do not find those practices persuasive. We note that in *INS v. Chadha*, when the Supreme Court was considering the constitutionality of a one-house veto, it considered a similar argument concerning the increasing frequency of such legislative veto provisions. 462 U.S. 919, 944-45 (1983). In rejecting that argument, the *Chadha* Court stated that "our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing fre-

quency. . . .” *Id.* at 944. Like the Supreme Court in *Chadha*, we conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.

Likewise, in *Myers v. United States*, the Court considered a statutory limitation on the President’s power to remove his appointees. 272 U.S. 52 (1926). In a powerful tribute to the strength of interpretations from the time of the ratification, Chief Justice Taft, writing for the Court, gave almost dispositive weight to the First Congress’s construction of the Constitution on the question of the President’s removal power. *See id.* at 174-75. The Court expressly valued the early practice over recent 1870s legislation inconsistent with the early understanding.

The Constitution’s overall appointments structure provides additional confirmation of the intersession interpretation. The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent. Hamilton wrote in *Federalist No. 67* that advice and consent “declares the general mode of appointing officers of the United States,” while the Recess Appointments Clause serves as “nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.” The Federalist No. 67, *supra*, at 408. The “general mode” of participation of the Senate through advice and consent served an important function: “It would be an excellent check upon a spirit of favoritism in the

President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, *supra*, at 456.

Nonetheless, the Framers recognized that they needed some temporary method for appointment when the Senate was in the recess. At the time of the Constitution, intersession recesses were regularly six to nine months, Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1498 (2005), and senators did not have the luxury of catching the next flight to Washington. To avoid government paralysis in those long periods when senators were unable to provide advice and consent, the Framers established the "auxiliary" method of recess appointments. But they put strict limits on this method, requiring that the relevant vacancies happen during "the Recess." It would have made little sense to extend this "auxiliary" method to any intrasession break, for the "auxiliary" ability to make recess appointments could easily swallow the "general" route of advice and consent. The President could simply wait until the Senate took an intrasession break to make appointments, and thus "advice and consent" would hardly restrain his appointment choices at all.

To adopt the Board's proffered intrasession interpretation of "the Recess" would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause.

As the Supreme Court observed in *Freytag v. Commissioner of Internal Revenue*, "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." 501 U.S. 868, 883 (1991) (internal quotation marks and citation omitted). In short, the Constitution's appointments structure—the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent—makes clear that the Framers used "the Recess" to refer only to the recess between sessions.

Confirming this understanding of the Recess Appointments Clause is the lack of a viable alternative interpretation of "the Recess." The first alternative interpretation is that "the Recess" refers to all Senate breaks. But no party presses that interpretation, and for good reason. *See* Resp't Br. at 65 (conceding that "a routine adjournment for an evening, a weekend, or a lunch break occurring during regular working sessions of the Senate does not constitute a 'Recess of the Senate' under the Recess Appointments Clause"). As discussed above, the appointments structure would have been turned upside down if the President could make appointments any time the Senate so much as broke for lunch. This interpretation also cannot explain the use of the definite article "the," the singular "Recess" in the Clause, or why the Framers used "adjournment" differently from "Recess."

The second possible interpretation is that "the Recess" is a practical term that refers to some substantial passage of time, such as a ten- or twenty-day break. Attorney General Daugherty seemed to abandon the intersession interpretation in 1921 and adopted this functional interpretation, arguing that "[t]o give the word 'recess' a technical and not a practical construction, is to disregard substance for form." 33 Op. Att'y Gen. 20, 22 (1921). Daugherty refused to put an exact time on the length of the break necessary for a "Recess," stating that "[i]n the very nature of things the line of demarcation cannot be accurately drawn." *Id.* at 25.

We must reject Attorney General Daugherty's vague alternative in favor of the clarity of the intersession interpretation. As the Supreme Court has observed, when interpreting "major features" of the Constitution's separation of powers, we must "establish[] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). Thus, the inherent vagueness of Daugherty's interpretation counsels against it. Given that the appointments structure forms a major part of the separation of powers in the Constitution, the Framers would not likely have introduced such a flimsy standard. Moreover, the text of the Recess Appointments Clause offers no support for the functional approach. Some undefined but substantial number of days-break is not a plausible interpretation of "the Recess."

A third alternative interpretation of "the Recess" is that it means any adjournment of more than three days pursuant to the Adjournments Clause. *See* U.S. Const. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days. . . ."). This interpretation lacks any constitutional basis. The Framers did not use the word "adjournment" in the Recess Appointments Clause. Instead, they used "the Recess." The Adjournments Clause and the Recess Appointments Clause exist in different contexts and contain no hint that they should be read together. Nothing in the text of either Clause, the Constitution's structure, or its history suggests a link between the Clauses. Without any evidence indicating that the two Clauses are related, we cannot read one as governing the other. We will not do violence to the Constitution by ignoring the Framers' choice of words.

The fourth and final possible interpretation of "the Recess," advocated by the Office of Legal Counsel, is a variation of the functional interpretation in which the President has discretion to determine that the Senate is in recess. *See* 2012 OLC Memo, *supra*, at 23 ("[T]he President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."). This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as "self-executing safeguard[s] against the en-

croachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. The intersession interpretation of "the Recess" is the only one faithful to the Constitution's text, structure, and history.

The Board's arguments supporting the intrasession interpretation are not convincing. The Board relies on an Eleventh Circuit opinion holding that "the Recess" includes intrasession recesses. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). The *Evans* court explained that contemporaneous dictionaries defined "recess" broadly as "remission and suspension of any procedure." *Id.* (quoting 2 Johnson, *supra*, at 1650). The court also dismissed the importance of the definite article "the," discounted the Constitution's distinction between "adjournment" and "Recess" by interpreting "adjournment" as a parliamentary *action*, and emphasized the prevalence of intrasession recess appointments in recent years. *See id.* at 1225-26.

While we respect our sister circuit, we find the *Evans* opinion unconvincing. Initially, we note that the Eleventh Circuit's analysis was premised on an

incomplete statement of the Recess Appointments Clause's purpose: "to enable the President to fill vacancies to assure the proper functioning of our government." *Id.* at 1226. This statement omits a crucial element of the Clause, which enables the President to fill vacancies *only when the Senate is unable to provide advice and consent*. *See, e.g.*, 2012 OLC Memo, *supra*, at 10 ("[T]he recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments."). As we have explained, the Clause deals with the Senate's being unable to provide advice and consent only during "the Recess," *viz.*, an intersession recess. As written, the Eleventh Circuit's statement disregards the full structure of the Constitution's appointments provision, which makes clear that the recess appointments method is secondary to the primary method of advice and consent. The very existence of the advice and consent requirement highlights the incompleteness of the Eleventh Circuit's broad statement of constitutional purpose.

Nor are we convinced by the Eleventh Circuit's more specific arguments. First, the natural meaning of "the Recess" is more limited than the broad dictionary definition of "recess." In context, "the Recess" refers to a specific state of the legislature, so sources other than general dictionaries are more helpful in elucidating the term's original public meaning. *See Virginia*, 148 U.S. at 519 ("[T]he meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used."). Indeed, it is telling that even the Board concedes that "Recess"

does not mean *all* breaks, *see* Resp't Br. at 65, which is the interpretation suggested by the dictionary definition. *See* 2 Johnson, *supra*, at 1650 (defining "recess" as the "remission and suspension of any procedure").

Second, the Eleventh Circuit fails to explain the use of the singular "Recess," and it underestimates the significance of the definite article "the" preceding "Recess" by relying on twentieth-century dictionaries to argue that "the" can come before a generic term. *See Evans*, 387 F.3d at 1224-25. Contemporaneous dictionaries treated "the" as "noting a *particular* thing." 2 Johnson, *supra*, at 2041 (emphasis added).

Third, as the Eleventh Circuit acknowledged, the Supreme Court has suggested that the Constitution does not in fact only use "adjournment" to denote parliamentary action. *See Evans*, 387 F.3d at 1225 (citing *Wright v. United States*, 302 U.S. 583 (1938)).

In fact, the Constitution uses "adjournment" to refer generally to legislative breaks. It uses "the Recess" differently and then incorporates the definite article. Thus, the Eleventh Circuit's interpretation of "adjournment" fails to distinguish between "adjournment" and "Recess," rendering the latter superfluous and ignoring the Framers' specific choice of words. *Cf. Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) (plurality opinion) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot

be presumed that any clause in the constitution is intended to be without effect. . . .").

The Board offers as an example of an early interpretation of "the Recess" consistent with its view the case of a senator appointed by the governor of New Jersey to fill a vacated seat in the United States Senate pursuant to Article I, Section 3, Clause 2. Under that clause, "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2. In the example relied upon by the Board, Franklin Davenport was "appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature" and "took his seat in the Senate." 8 Annals of Cong. 2197 (1798). The Board then offers evidence that the New Jersey Legislative Council Journal, 23d Session 20-21 (1798-99), documents an intrasession recess at the apparent time of Davenport's appointment. We do not find this persuasive. Nothing in the Annals of Congress establishes that Congress considered or even knew that the appointment was made during an intrasession recess of the legislature. The example offers at most the understanding of one state governor, not a common understanding of "the Recess" as used in the Recess Appointments Clause.

Finally, we would make explicit what we have implied earlier. The dearth of intrasession appointments in the years and decades following the ratifica-

tion of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments. Recent Presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law.

As Chief Justice Marshall made clear in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." 5 U.S. (1 Cranch) at 177. In *Marbury*, the Supreme Court established that if the legislative branch has acted in contravention of the Constitution, it is the courts that make that determination. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court made clear that the courts must make the same determination if the executive has acted contrary to the Constitution. 343 U.S. 579 (1952). That is the case here, and we must strike down the unconstitutional act.

In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3

and while that new session continued. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated. *See* 29 U.S.C. § 153(b); *New Process Steel*, 130 S. Ct. at 2644-45.

B. Meaning of "Happen"

Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order, as we suggested above, we also agree that the petitioner is correct in its understanding of the meaning of the word "happen" in the Recess Appointments Clause. The Clause permits only the filling up of "Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Our decision on this issue depends on the meaning of the constitutional language "that may happen during the Recess." The company contends that "happen" means "arise" or "begin" or "come into being." The Board, on the other hand, contends that the President may fill up any vacancies that "happen to exist" during "the Recess." It is our firm conviction that the appointments did not occur during "the Recess." We proceed now to determine whether the appointments are also invalid as the vacancies did not "happen" during "the Recess."

In determining the meaning of "happen" in the Recess Appointments Clause, we begin our analysis as we did in the first issue by looking to the natural meaning

of the text as it would have been understood at the time of the ratification of the Constitution. *See Heller*, 128 S. Ct. at 2788. Upon a simple reading of the language itself, we conclude that the word "happen" could not logically have encompassed any vacancies that happened to exist during "the Recess." If the language were to be construed as the Board advocates, the operative phrase "that may happen" would be wholly unnecessary. Under the Board's interpretation, the vacancy need merely exist during "the Recess" to trigger the President's recess appointment power. The Board's interpretation would apply with equal force, however, irrespective of the phrase "that may happen." Its interpretation therefore deprives that phrase of any force. By effectively reading the phrase out of the Clause, the Board's interpretation once again runs afoul of the principle that every phrase of the Constitution must be given effect. *See Marbury*, 5 U.S. (1 Cranch) at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect. . . .").

For our logical analysis of the language with respect to the meaning of "happen" to be controlling, we must establish that it is consistent with the understanding of the word contemporaneous with the ratification. Dictionaries at the time of the Constitution defined "happen" as "[t]o fall out; to chance; to come to pass." 1 Johnson, *supra*, at 965; *see also Evans*, 387 F.3d at 1230 & n.4 (Barkett, J., dissenting) (surveying a variety of eighteenth-century dictionaries and concluding that they all defined "happen" similarly). A vacancy happens, or "come[s] to pass," only when it

first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess. The term "happen" connotes an event taking place—an action—and it would be plainly incorrect to say that an event happened during some period of time when in fact it happened before that time.

In addition to the logic of the language, there is ample other support for this conclusion. First, we repair again to examination of the structure of the Constitution. If we accept the Board's construction, we eviscerate the primary mode of appointments set forth in Article II, Section 2, Clause 2. It would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose. A President at odds with the Senate over nominations would never have to submit his nominees for confirmation. He could simply wait for a "recess" (however defined) and then fill up all vacancies.

We further note that the "arise" interpretation is consistent with other usages of "happen" in the Constitution. Article I, Section 3, Clause 2, the Senate Vacancies Clause, provides for the filling of vacancies in Senate seats. Though now amended, at the time of the adoption of the Constitution, that section stated: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments

until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2. That Clause makes sense if "happen . . . during the Recess" refers to arising or coming into being during "the Recess." If it merely means that the vacancy happens to exist at the time of a recess, it becomes implausible.

Our construction of "happen" as meaning "arise" in the Recess Appointments Clause is consistent with the use of the same wording in the Senate Vacancies Clause. It is well established that "inconsistency [within the Constitution] is to be implied only where the context clearly requires it." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949). Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen "during the Recess" is consistent with the apparent meaning of the Senate Vacancies Clause. The interpretation proffered by the Board is not.

As with the first issue, we also find that evidence of the earliest understanding of the Clause is inconsistent with the Board's position. It appears that the first President, who took office shortly after the ratification, understood the recess appointments power to extend only to vacancies that arose during senatorial recess. More specifically, President Washington followed a practice that strongly suggests that he understood "happen" to mean "arise." If not enough time remained in the session to ask a person to serve in an office, President Washington would nominate a person

without the nominee's consent, and the Senate would confirm the individual before recessing. *See* Rappaport, *supra*, at 1522. Then, if the person declined to serve during the recess, thereby creating a new vacancy during the recess, President Washington would fill the position using his recess appointment power. *Id.* If President Washington and the early Senate had understood the word "happen" to mean "happen to exist," this convoluted process would have been unnecessary.

In 1792, Edmund Randolph, the first Attorney General, addressed the issue of an office that had become vacant during the session when the Secretary of State sought his view. Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 The Papers of Thomas Jefferson 165, 165-67 (John Catanzariti et al. eds., 1990) ("Randolph Opinion"). Addressing the vacancy, concluding that it did not "happen" during the recess, and thereby rejecting the "exist" interpretation, Randolph wrote:

> But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.

Id. at 166.

Alexander Hamilton, similarly, wrote that "[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23

The Papers of Alexander Hamilton 94, 94 (Harold C. Syrett ed., 1976); *see also* The Federalist No. 67, *supra*, at 408 (explaining the purpose of the Clause by stating that "vacancies might happen *in their recess*" (emphasis in original)). In March 1814, Senator Christopher Gore argued that the Clause's scope is limited to "vacanc[ies] that may happen during the recess of the Senate":

> If the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well-established maxim: "Expressio unius est exclusio alterius."

26 Annals of Cong. 653 (1814); *see United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (defining the interpretive canon of "expressio unius est exclusio alterius" as "the expression of one is the exclusion of others" (italics omitted)).

Additional support for the "arise" interpretation comes from early interpreters who understood that the Clause only applied to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created. Justice Joseph Story explained that "[t]he word 'happen' had relation to some casualty," a statement consistent with the arise interpretation. 3 Joseph Story, Commentaries on the Constitution § 1553 (1833) ("Story's Commentaries"), *reprinted in* 4 The Found-

ers' Constitution 122 (Philip B. Kurland & Ralph Lerner eds., 1987).

We recognize that some circuits have adopted the "exist" interpretation. *See Evans*, 387 F.3d at 1226-27; *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Those courts, however, did not focus their analyses on the original public meaning of the word "happen." In arguing that happen could mean "exist," the *Evans* majority used a modern dictionary to define "happen" as "befall," and then used the same modern dictionary to define "befall" as "happen to be." *See* 387 F.3d at 1226 (quoting 6 Oxford English Dictionary 1096 (2d ed. 1989); 2 *id.* at 62). As the *Evans* dissent argued, "[t]his is at best a strained effort to avoid the available dictionary evidence." *Id.* at 1230 n.4 (Barkett, J., dissenting). A modern cross-reference is not a contemporary definition. The Board has offered no dictionaries from the time of the ratification that define "happen" consistently with the proffered definition of "happen to exist."

The *Evans* majority also relied on a handful of recess appointments supposedly made by Presidents Washington and Jefferson to offices that became vacant prior to the recess. *Id.* at 1226 (majority opinion). Subsequent scholarship, however, has demonstrated that these appointments were "in fact examples of the practice of appointing an individual without his consent and then, if he turns down the appointment during the recess, making a recess appointment at that time." Rappaport, *supra*, at 1522 n.97. Again, as

with the appointments by President Washington referenced above, the use of this convoluted method of appointment demonstrates that early interpreters read "happen" as "arise."

The *Evans*, *Woodley*, and *Allocco* courts all relied on supposed congressional acquiescence in the practice of making recess appointments to offices that were vacant prior to the recess because 5 U.S.C. § 5503 permits payment to such appointees in some circumstances. *See Evans*, 387 F.3d at 1226-27; *Woodley*, 751 F.2d at 1013; *Allocco*, 305 F.2d at 715 (referring to § 5503's predecessor statute); *see also* 5 U.S.C. § 5503 (denying recess appointees payment "if the vacancy [they filled] existed while the Senate was in session," subject to certain exceptions).

Section 5503 was passed in 1966. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 475. Its similar predecessor statute was passed in 1940. Act of July 11, 1940, ch. 580, 54 Stat. 751. The enactment of statutes in 1940 and 1966 sheds no light on the original understanding of the Constitution. This is particularly true as prior statutes refused payments of salaries to all recess appointees whose vacancies arose during the session. *See* Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646 (stating that no "money [shall] be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed

by the Senate"); 5 U.S.C. § 56 (1934). We doubt that our sister circuits are correct in construing this legislation as acquiescent. The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist "the overgrown prerogatives of the other branches of government." The Federalist No. 58, *supra*, at 357. The 1863 Act constitutes precisely that: resistance to executive aggrandizement. In any event, if the Constitution does not empower the President to make the appointments, "[n]either Congress nor the Executive can agree to waive . . . structural protection[s]" in the Appointments Clause. *Freytag*, 501 U.S. at 880; *cf. Chadha*, 462 U.S. at 942 n.13 ("The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.").

As we recalled in our analysis of the first issue, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 5 U.S. (1 Cranch) at 177. The Senate's desires do not determine the Constitution's meaning. The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. *See Freytag*, 501 U.S. at 878. These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another. As Madison explained in *Federalist No. 51*, the division of power between the

branches forms part of the "security [that] arises to the rights of the people." The Federalist No. 51, *supra*, at 320. Or as the Supreme Court held in *Freytag*, "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." 501 U.S. at 880. In short, nothing in 5 U.S.C. § 5503 changes our view that the original meaning of "happen" is "arise."

Our sister circuits and the Board contend that the "arise" interpretation fosters inefficiencies and leaves open the possibility of just what is occurring here—that is, a Board that cannot act for want for a quorum. The Board also suggests more dire consequences, arguing that failure to accept the "exist" interpretation will leave the President unable to fulfill his chief constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and even suggests that the interpretation we adopt today could pose national security risks. *See Noel Canning v. NLRB*, No. 12-1115, Oral Argument Tr. at 52 (D.C. Cir. Dec. 5, 2012). But if Congress wished to alleviate such problems, it could certainly create Board members whose service extended until the qualification of a successor, or provide for action by less than the current quorum, or deal with any inefficiencies in some other fashion. And our suggestion that Congress can address this issue is no mere hypothesis. The two branches have repeatedly, and thoroughly, addressed the problems of vacancies in the executive branch. Congress has provided for the temporary filling of a vacancy in a particular executive office by an "acting" officer authorized to perform all of the duties and

exercise all of the powers of that office, *see, e.g.*, 28 U.S.C. § 508 (Attorney General); 29 U.S.C. § 552 (Secretary of Labor), including key national security positions. *See, e.g.*, 10 U.S.C. § 132(b) (Secretary of Defense); *id.* § 154(d), (e) (Chairman, Joint Chiefs of Staff); 50 U.S.C. § 403-3a(a) (Director of National Intelligence); *id.* § 403-4c(b)(2) (Director of Central Intelligence Agency); *see also* S. Rep. No. 105-250, at 16-17 (1998) (listing other provisions). Moreover, Congress statutorily addressed the filling of vacancies in the executive branch not otherwise provided for. *See* 5 U.S.C. §§ 3345-3349d.

Congress has also addressed the problem of vacancies on various multimember agencies, providing that members may continue to serve for some period past the expiration of their commissions until successors are nominated and confirmed. *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (Commodities Futures Trading Commission); 15 U.S.C. § 78d(a) (Securities and Exchange Commission); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 47 U.S.C. § 154(c) (Federal Communications Commission). And we have cited only a fraction of the multimember boards for which Congress has provided such potential extensions.

Admittedly, Congress has chosen not to provide for acting NLRB members. *See* 5 U.S.C. § 3349c(1)(A). But that choice cannot support the Board's interpretation of the Clause. We cannot accept an interpretation of the Constitution completely divorced from its original meaning in order to resolve exigencies created by—and equally remediable by—the executive and

legislative branches. And as the Supreme Court expressly noted in *New Process Steel*, in the context of the Board, "[i]f Congress wishes to allow the Board to decide cases with only two members, it can easily do so." 130 S. Ct. at 2645.

In any event, if some administrative inefficiency results from our construction of the original meaning of the Constitution, that does not empower us to change what the Constitution commands. As the Supreme Court observed in *INS v. Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. at 944. It bears emphasis that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.*

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of "happen" was "arise," we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

Applying this rule to the case before us, we further hold that the relevant vacancies did not arise during the intersession recess of the Senate. The three Board seats that the President attempted to fill on

January 4, 2012, had become vacant on August 27, 2010, August 27, 2011, and January 3, 2012, respectively. *See* Part III, *supra* (showing the dates for Chairman Liebman and Members Schaumber and Becker's departures). On August 27, 2010, the Senate was in the midst of an intrasession recess, so the vacancy that arose on that date did not arise during "the Recess" for purposes of the Recess Appointments Clause. *See* Congressional Directory for the 112th Congress 538 (2011). Similarly, the Senate was in an intrasession recess on August 27, 2011, so the vacancy that arose on that date also did not qualify for a recess appointment. *See id.*

The seat formerly occupied by Member Becker became vacant at the "End" of the Senate's session on January 3, 2012—it did not "happen during the Recess of the Senate." First, this vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.

It has long been the practice of the Senate, dating back to the First Congress, to conclude its sessions and enter "the Recess" with an adjournment *sine die*.[1]

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[1] *See* Congressional Directory for the 112th Congress, *supra*, at 522–38 (listing all of the Senate's intersession recesses prior to 2012); *see, e.g.*, 156 Cong. Rec. S11,070 (daily ed. Dec. 22, 2010) (concluding Second Session of 111th Congress with adjournment *sine die*); 147 Cong. Rec. 27,953 (2001) (concluding First Session of 107th Congress with adjournment *sine die*); 139 Cong. Rec. 32,433 (1993) (concluding First Session of 103d Congress with adjournment *sine die*); 128 Cong. Rec. 33,629 (1982) (concluding Second Session of the 97th Congress with adjournment *sine die*); 125 Cong.

The Senate has followed this practice even for relatively brief intersession recesses.[2]

Rec. 37,605 (1979) (concluding First Session of 96th Congress with adjournment *sine die*); 117 Cong. Rec. 47,658 (1971) (concluding First Session of the 92d Congress with adjournment *sine die*); 105 Cong. Rec. 19,688 (1959) (concluding First Session of 86th Congress with adjournment *sine die*); 91 Cong. Rec. 12,525 (1945) (concluding First Session of 79th Congress with adjournment *sine die*); 65 Cong. Rec. 11,202 (1924) (concluding First Session of 68th Congress with adjournment *sine die*); 45 Cong. Rec. 9,080 (1910) (concluding Second Session of 61st Congress with adjournment *sine die*); 23 Cong. Rec. 7,081 (1892) (concluding First Session of 52d Congress with adjournment *sine die*); Cong. Globe, 42d Cong., 2d Sess. 4,504 (1872) (concluding Second Session of 42d Congress with adjournment *sine die*); Cong. Globe, 23d Cong., 1st Sess. 480 (1834) (concluding First Session of 23d Congress with adjournment *sine die*); 29 Annals of Cong. 372 (1816) (concluding First Session of 14th Congress with adjournment *sine die*); 3 Annals of Cong. 668 (1793) (concluding Second Session of 2d Congress with adjournment *sine die*); 2 Annals of Cong. 1786 (1791) (concluding Third Session of 1st Congress with adjournment *sine die*).

[2] *See, e.g.*, 154 Cong. Rec. 24,808 (2009) (concluding Second Session of 110th Congress and entering three-day intersession recess with adjournment *sine die*); 141 Cong. Rec. 38,608 (1996) (concluding First Session of 104th Congress and entering momentary intersession recess with adjournment *sine die*); 137 Cong. Rec. 36,364 (1992) (concluding First Session of 102d Congress with adjournment *sine die* at the same time that the Second Session began); 109 Cong. Rec. 25,674 (1963) (concluding First Session of 88th Congress and entering eight-day intersession recess with adjournment *sine die*); 96 Cong. Rec. 17,121 (1951) (concluding Second Session of 81st Congress and entering one-day intersession recess with adjournment *sine die*); 94 Cong. Rec. 10,264 (1948) (concluding Second Session of 80th Congress and entering three-day intersession recess with adjournment *sine die*); 87 Cong. Rec. 10,143 (1942) (concluding First Session of 77th Congress and entering three-day

Indeed, various acts of Congress refer to the adjournment *sine die* as the conclusion of the session. *See, e.g.*, 2 U.S.C. § 682(5) (for purpose of congressional budget consideration, "continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die"); 5 U.S.C. § 906(b)(1) (for purpose of agency reorganization plans, "continuity of session is broken only by an adjournment of Congress sine die").

We find a recent example of this longstanding practice, with dates nearly identical to those in this case, to be particularly instructive. On December 31, 2007, the Senate met in *pro forma* session and concluded the First Session of the 110th Congress, and entered "the Recess," with an adjournment *sine die*. *See* Congressional Directory for the 112th Congress, *supra*, at 537 (confirming that the First Session of the 110th Congress ended on December 31, 2007); 153 Cong. Rec. 36,508 (2007) (adjourning Senate *sine die*). It then convened the Second Session of the 110th Congress with a *pro forma* session on January 3, 2008. *See* Congressional Directory for the 112th Congress, *supra*, at 537 (confirming that the Second Session of the 110th Congress began on January 3, 2008); 154 Cong. Rec. 2 (2008) (convening Second Session).

Because, in this case, the Senate declined to adjourn *sine die* on December 30, 2011, it did not enter an intersession recess, and the First Session of the

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intersession recess with adjournment *sine die*); 76 Cong. Rec. 5,656 (1933) (concluding Second Session of 72d Congress and entering one-day intersession recess with adjournment *sine die*).

112th Congress expired simultaneously with the beginning of the Second Session. *See, e.g.*, 86 Cong. Rec. 14,059 (1941) (noting that, in the absence of an adjournment *sine die* on January 3, 1941, "[t]he third session of the Seventy-sixth Congress expired automatically, under constitutional limitation, when the hour of 12 o'clock arrived").

Although the December 17, 2011, scheduling order specifically provided that the Second Session of the 112th Congress would convene on January 3, 2012, *see* 157 Cong. Rec. S8,783 (daily ed. Dec. 17, 2011), it did not specify when the First Session would conclude. And, at the last *pro forma* session before the January 3, 2012, session, the Senate adjourned to a date certain: January 3, 2012. *See* 157 Cong. Rec. S8,793 (daily ed. Dec. 30, 2011). Because the Senate did not adjourn *sine die*, it did not enter "the Recess" between the First and Second Sessions of the 112th Congress. Becker's appointment therefore expired at the end of the First Session on January 3, 2012, and the vacancy in that seat could not have "happen[ed]" during "the Recess" of the Senate.

Second, in any event, the Clause states that a recess appointment expires "at the End of [the Senate's] next Session," U.S. Const. art. II, § 2, cl. 3, not "at the beginning of the Senate's next Recess." Likewise, the structure of Article II, Section 2 supports this reading, for "it makes little sense to allow a second consecutive recess appointment for the same position, because the President and the Senate would have had an entire Senate session during the first recess appointment to

nominate and confirm a permanent appointee." Rappaport, *supra*, at 1509. The January 3, 2012, vacancy thus did not arise during the recess, depriving the President of power to make an appointment under the Recess Appointments Clause. Because none of the three appointments were valid, the Board lacked a quorum and its decision must be vacated. *See* 29 U.S.C. § 153(b); *New Process Steel*, 130 S. Ct. at 2644-45.

Even if the "End" of the session were "during the Recess," meaning that the January 3, 2012, vacancy arose during some imaginary recess, we hold that the appointment to that seat is invalid because the President must make the recess appointment during the same intersession recess when the vacancy for that office arose. The Clause provides that a recess appointee's commission expires at "the End of [the Senate's] next Session," which the Framers understood as "the end of the *ensuing* session." The Federalist No. 67, *supra*, at 408 (emphasis added).

Consistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it, the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose. There is no reason the Framers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations. The earliest authoritative commentary on the Constitution explains that the purpose of the

Recess Appointments Clause was to give the President authorization "to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." Story's Commentaries, *supra*, § 1551, *reprinted in* 4 The Founders' Constitution, *supra*, at 122; *see also Evans*, 387 F.3d at 1233 (Barkett, J., dissenting).

As with the first issue, we hold that the petitioner's understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void.

V. THE MOTION FOR INTERVENTION

As we referenced early in this opinion, we have before us a motion for intervention. The Chamber of Commerce and the Coalition for a Democratic Workplace seek to intervene. It is the law of this circuit that litigants seeking to intervene in cases involving direct review of administrative actions must establish Article III standing. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538-39 (D.C. Cir. 1999). Our judicial power is limited to "Cases" or "Controversies," U.S. Const. art. III, § 2, cl. 1, meaning that litigants must show "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551 (1996).

The movants claim to have "associational standing." In that context, the Supreme Court has explained that "an association has standing to bring suit on behalf of

its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

We need not decide the question of the movants' standing. Our precedent is clear: "[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Ry. Labor Execs.' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (per curiam); *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973) ("We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by [the original appellants], and nothing is gained or lost by the presence or absence of [the additional appellants].").

Noel Canning has standing. The case, like other petitions for review of administrative adjudications, proceeded between the party to the administrative adjudication and the agency. We reached our decision. The motion is now moot, and we order it dismissed. The Chamber could have had its say by filing as an amicus, but for reasons satisfactory to itself, chose to attempt a strained claim of intervenor status.

CONCLUSION

For the reasons set forth above, we grant the petition of Canning and vacate the Board's order. We

deny the cross-petition of the Board for enforcement of its invalid order.

So ordered.

GRIFFITH, *Circuit Judge*, concurring in the opinion except as to Part IV.B and concurring in the judgment:

The majority acknowledges that our holding on intrasession recess appointments is sufficient to vacate the Board's order, *see supra* slip op. at 30 [p. 35a, *supra*], and I would stop our constitutional analysis there. If we need not take up a constitutional issue, we should not. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (noting the "deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary" (internal quotation marks omitted)); *Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981) (highlighting the Court's "attempt to confine the opinion to the very questions necessary to decision of the case"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885))). I agree that the Executive's view that the President can fill vacancies that "happen to exist" during "the Recess" is suspect, but that position dates back to at least the 1820s, *see* Exec. Auth. To Fill Vacancies, 1 Op. Att'y Gen. 631, 633-34 (1823), making it more venerable than the much more recent practice

of intrasession recess appointments. *See Mistretta v. United States*, 488 U.S. 361, 399-400 (1989); *INS v. Chadha*, 462 U.S. 919, 944-45 (1983). We should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it.

APPENDIX B

Case No. 19–CA–32872

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, *AND* TEAMSTERS LOCAL 760

Feb. 8, 2012

DECISION AND ORDER

BY MEMBERS HAYES, FLYNN, AND BLOCK

On September 26, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent, Noel Canning, filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs, and has decided to affirm the judge's rulings, findings,[2] and con-

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent, through Noel's comments that he would give employees what they wanted if only they would get out of the Union, independently violated Sec. 8(a)(1).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear pre-

clusions, to clarify his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

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ponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] The Respondent shall make whole the unit employees for any losses attributable to its failure to execute the 2010 agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall also make whole its unit employees by making delinquent contributions to the Union Pension Trust Fund that have not been made since October 1, 2010, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that an employee has made personal contributions to the Union Pension Trust Fund that have been accepted by the Fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Re-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Noel Canning, a division of the Noel Corporation, Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by refusing to reduce to writing and to execute a collective-bargaining agreement reached with the Union, Teamsters Local 760, embodying the terms agreed to on December 8, 2010, and ratified by the employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the parties' agreement.

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spondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that Respondent otherwise owes the Fund.

[4] We have modified the judge's recommended Order to include the appropriate remedial language for the violation found, and we have substituted a new notice to conform to the Order as modified. We note, specifically, that the modified Order does not require the Respondent to execute a contract with a 3-year term, but only to execute a contract embodying the agreement reached by the parties on December 8, 2010, and ratified by the employees on December 15, 2010, which agreement, as found by the judge, was for a 2-year term.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

(b) Give retroactive effect, to October 1, 2010, to the provisions of the collective-bargaining agreement reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

(c) Make all affected unit employees and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

(d) Make all affected unit employees whole, with interest, for the retroactive bonus (made to compensate employees for the length of time it took to get a

contract) agreed upon by the Respondent and the Union on December 8, 2010.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

Within 14 days after service by the Region, post at its facility and place of business in Yakima, Washington, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2010.

Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2012

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Brian E. Hayes, Member

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Terence F. Flynn, Member

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union in good faith by not reducing to writing and signing a collective-bargaining agreement reached with the Union, embodying the terms agreed to on December 8, 2010, and ratified by employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

All production employees, including lead production, dock/warehouse employees, including lead

dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

WE WILL give retroactive effect, to October 1, 2010, to the collective-bargaining agreement, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

WE WILL make our unit employees and the Union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

WE WILL make our unit employees whole, with interest, for the retroactive bonus.

NOEL CANNING, A DIVISION OF THE NOEL CORP.

Ryan Connolly, Esq., for the General Counsel.
Gary Lofland, Esq. (Lofland and Associates), of Yakima, Washington, for the Respondent.

Bob Koerner, Business Representative, Teamsters Local 760, of Yakima, Washington for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Yakima, Washington, on June 21 and 22, 2011. The charge was filed by Teamsters Local 760 (the Union) on December 15, 2010, and an amended charge was filed by the Union on February 7, 2011.

Thereafter, on March 31, 2011, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Noel Canning, a Division of the Noel Corporation (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington state corporation, maintains an office and place of business in Yakima, Washington, where it is engaged in the business of bottling and distributing Pepsi-Cola products. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000, and annually purchases and receives at its Yakima, Washington facility goods, products, and materials valued in excess of $50,000 directly from points outside the State of Washington. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by certain statements made during the course of bargaining, and whether the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to execute and enter into a collective-bargaining agreement verbally agreed to by the parties during negotiations.

B. Facts

The parties had maintained a long-standing collective-bargaining relationship over successive collective-bargaining agreements. The prior collective-bargaining agreement extended from May 1, 2007, to April 30, 2010.[1] The collective bargaining unit is described as follows:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance

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[1] All dates or time periods hereinafter are within 2010 unless otherwise specified.

employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

The current set of negotiations commenced on June 26. Negotiations took place on June 26, July 7, August 19, October 26, November 15, and December 8. The complaint alleges and the Respondent denies that the parties reached agreement on a contract during the December 8 bargaining session.

All the negotiations took place at the Union's premises. During the course of bargaining, the chief negotiator for the Union was Business Representative Bob Koerner. He was accompanied by the shop steward, Eddie Ford, and union member Matt Urlacher; however, during the December 8 session, Ford, who had sustained an injury, was replaced by union member Mark Weber. The Respondent was represented by Roger Noel, the Respondent's owner, Justin Noel, vice-president, Sam Brackney, plant manager, Larry Estes, chief financial officer, vice-president, and secretary, and Cindi Zimmerman, treasurer, although not all of these individuals were present at all the negotiating sessions. The record does not reflect whether there was a chief negotiator designated by the Respondent.

Business Representative Koerner took notes at each bargaining session. The notes were introduced into evidence. Koerner testified that Zimmerman and other members of the Respondent's negotiating team took notes at various sessions. Mark Weber

testified, infra, that he observed Zimmerman taking notes at the December 8 session.

The essential sticking points during negotiations involved wage and pension issues.[2] All other matters had been resolved. As testified to by Koerner and Weber, agreement was reached on December 8 that the Union would take back two wage/pension proposals to the unit employees for a secret-ballot vote; that the Union and Respondent would be bound by the outcome of the vote;[3] and that subject to the outcome of the vote, an agreement had been reached.

Koerner testified that on December 8, after other proposals were discussed, the Union countered with a proposal of a 2 year agreement providing for a 45-cents-per-hour increase for each of the 2 years, with the employees to determine by vote how much of the wage increase they wanted to divert to the Union's pension plan; further, the Respondent would continue to fully pay for the employees' medical insurance through the Respondent's medical plan. And, in addition, the employees would receive a bonus of $485

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[2] During negotiations, the Respondent and Union agreed to permit the employees to decide whether to remain with the Union's pension trust or to forego the Union's pension trust in favor of the Respondent's pension plan. A vote was taken, apparently sometime between the October 26 and November 15 bargaining sessions, and the employees voted to remain with the Union's pension trust.

[3] According to Koerner, the Union was to remain neutral prior to the vote and not advocate its position.

($380 after taxes) to compensate them for the length of time it had taken to reach a successor agreement.

Koerner testified that the Respondent countered with 40 cents per hour for each year, also with the foregoing understandings regarding the bonus and medical insurance. Although the Union was agreeable to the Respondent's counter-proposal, the Respondent believed the employees would be better off and would be putting more money in their pockets if they accepted an earlier offer proposed by the Respondent. This offer provided that the employees be required to contribute to a portion of their medical insurance; that for the first year of the contract they would receive a wage increase of 78 cents per hour, and an additional 12 cents per hour for the Union's pension trust; and that for the second year of the contract they would receive a wage increase of 33 cents per hour, with no additional amount for the Union's pension trust.

Koerner then proposed that the employees vote on each of the alternative proposals as "A" and "B" proposals. This was agreeable to the Respondent. Koerner agreed the Union would remain neutral and would not state a preference for either proposal. It was further understood and agreed that whichever proposal was selected by the employees, the bonus of $485 ($380 after taxes) would remain the same. The December 8 meeting ended, according to Koerner, when the parties shook hands and Koerner and Zimmerman agreed that Zimmerman would forward to him an email setting forth the understanding they had reached.

Weber, a current employee, has worked for the Respondent for 32 years. As noted, he was substituting for Shop Steward Ford at the December 8 session, the first bargaining session he had attended. Weber testified he "was there as a witness just to take down notes basically and then go back to the Plant and tell everybody how it had gone." Weber testified that when an agreement had been reached at that session he wrote down what had been agreed to and went over the items "point by point" with Zimmerman "right at the very end to make sure that I had everything correct in my mind about the two proposals I was going to take back." He explained this to the group, namely, that he had to make sure he had everything right, and reiterated to the group what had been agreed upon. Weber testified that Zimmerman "agreed with everything" step by step, stating "that's correct" as Weber reviewed from his notes each component of the "final two proposals that the Company and Bob [Koerner] had ironed out to take back to the employees for them to decide which of either they wanted to do and accept or not."

Weber further testified that after he got Zimmerman's confirmation that he "had everything down correctly," Roger Noel said he (Noel) was confused about whether the starting date of the new contract would be October 1 or November 1. Both Weber and Zimmerman simultaneously said "October 1," and Noel said, "then let's do it." And, according to Weber, "that was the end . . . we were done." Plant Manager Brackney nodded in agreement, and no one voiced any objections to the agreed upon terms as reiterated by

Weber and confirmed by Zimmerman. CFO Estes said, "[W]ell, write it up and get it sent over." Weber thanked everyone for letting him be a part of the process, and was the first to leave.

Weber's notes of the agreement, introduced into evidence, include the following: "Oct. 1, 2 year contract, Negotiations begin in September after Labor Day." The latter reference, according to Weber, concerns the next set of negotiations for the succeeding contract beginning in 2012. In this regard, Weber testified he asked Zimmerman whether the parties could begin the next set of negotiations while the contract was still in effect in order to avoid the instant awkward situation of beginning negotiations after the expiration of the contract. Zimmerman said, according to Weber, that we could start negotiations "right after Labor Day and by October 1st [2012] we could have a new contract ready to go and so we wouldn't be in this same boat again."

During the course of negotiations, according to Weber, Roger Noel twice "threw up his hands and said if you just get out of the Union, I'll give you anything you want." On one occasion Brackney, and perhaps others on the Respondent's negotiating team, said to Noel, "you can't say that," and Noel said, "I know I can't say that—this guy—pointing at Bob Koerner there—he said this guy will slap a lawsuit on me . . . something to that regard." On the second occasion, according to Weber, Brackney again

told Noel he couldn't say that, and Noel replied, "oh, I know that—I didn't mean it."[4]

Although there is some minor variance in the testimony of Koerner and Weber,[5] their testimony is consistent regarding the terms of the agreement and how it was to be voted on by the unit employees; and the notes they each took are consistent with this understanding.

On the following workday morning, December 9, in the lunchroom, in the presence of Plant Manager Brackney, Weber was explaining the terms of the two proposals to the employees at work. The employees, according to Weber, very much liked the "40–40" proposal as it came to be known. At some point that morning, Weber and Brackney agreed that they were both very happy that "it was all over" because the employees had been without a contract for quite some time. Brackney said, "You guys got a good deal." Weber agreed.

Later that day, according to Weber, he and Brackney talked about the "retro check pool"—the employ-

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[4] Koerner also testified that Brackney cautioned Noel about making these statements; however, on each occasion Noel simply responded, "I know." Unlike Weber, Koerner did not testify that Noel said he didn't mean it. The Respondent's witnesses testified that Noel stated something to the effect that the employees would be better off without the Union.

[5] For example, Koerner testified that Zimmerman recounted the terms of the agreement to Weber, whereas Weber testified that he recounted each term of the agreement to Zimmerman who replied, "that's correct."

ees would each put in $10 and the highest poker hand, derived from the check numbers on the retroactive checks to be paid to the employees to compensate them for the lost wages during the course of bargaining, would win the pool.

Apparently on the same day, Weber learned from Koerner that Roger Noel was changing his mind regarding the agreement. On that day Weber went around the plant telling employees that Roger Noel was backing off on the agreement. While he was talking with two employees, Brackney happened to come by and Weber reviewed the terms of the "40-40" proposal with the three of them. Weber said to Brackney, "You remember now Sam when I asked Cindi [Zimmerman]—I have to get this all right and everything and Sam completed my sentence for me. He said yes, you had to get it all right because you had to take it back to the guys the next day and be able to tell them what it was." Weber said that Roger Noel was now changing his mind, and Brackney said he did not know why Roger Noel would change his mind.

As noted above, Koerner testified that at the conclusion of the December 8 negotiating session, he asked Zimmerman to email to him the agreement they had just reached, and shook hands with each member of the Respondent's negotiating team. He also asked if he could use the Respondent's conference room to conduct the vote of the unit members. It was agreed that the room would be available to the Union for the

vote. Koerner's notes of the session state, inter alia, "Company will send typed version of (TA)."[6]

On the following day, December 9, Zimmerman sent Koerner an email entitled "Proposal," which differed significantly from the terms of the Union's preference set forth above: the 40-cent-per-hour increase for each of the 2 years of the agreement remained the same, but for each of the 2 years the "Pension contribution [was] not to exceed $.10 of the $.40." Nothing was said about the Respondent's alternative preference.

On December 10, in the morning, Koerner sent Zimmerman an email stating that the attachment to the email "shows what was Tentatively Agreed on December 9,[7] (sic) 2010. We need get this resolved prior to Wednesday. Mark [Weber] and Matt [Urlacher] have been explaining to the other employees the proposals." The attachment to the email sets forth the Union's understanding that "The wage pension diversion for each year was proposed as $.40 per hour with the employees diverting whatever portion to pension which would be voted by the group."

On the morning of December 10, Koerner posted a "Notice" at the Respondent's premises to "All Bar-

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[6] Koerner's testimony is not inconsistent with that of Weber regarding who would send the typed version of the agreement to whom, as Weber had left the meeting before its conclusion; it is probable that both versions are correct.

[7] This date is obviously incorrect as no further negotiations took place after December 8.

gaining Unit Members" announcing a "Vote for Contract" on Wednesday December 15, 2010, at the Respondent's "Front Meeting Room."

On the evening of December 10, Koerner spoke by telephone with Roger Noel; Zimmerman and Estes were also listening on a speakerphone. It was a confrontational conversation. Koerner told Noel the Respondent's foregoing email proposal was not what was agreed to, and that the $.10 pension amount had never even been discussed at the table. Noel, according to Koerner, simply replied that was the amount he was going to allow the employees to put in the pension trust. Noel also said, according to Koerner, "that it [the agreement] wasn't in writing and it was his company and he had the right to make the decisions." Koerner disagreed, saying it was not Noel's right to renege on the tentative agreement, and that the Union intended to go ahead with the ratification vote as agreed upon.[8]

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[8] The Respondent points out in its brief some rather confusing language contained in Koerner's Board affidavit, as follows: "I told Roger [Noel] that I was voting the contract on Wednesday and that I would vote the contract that we TA'd during the December 8 meeting <u>noting</u> (sic) different from that TA." (Emphasis supplied.) The Respondent maintains that this language should be interpreted to mean that Koerner intended to have the employees vote on something "different" than what he believed had been agreed upon on December 8. Koerner, when questioned about this, believed the language in his affidavit was correct, and that the "difference" between what was TA'd and voted upon was simply a matter of arithmetic. Thus, he explained the notes he took of the agreement on December 8, state, regarding the retroactive bonus,

The ratification vote was conducted on December 15, as scheduled. The unit employees overwhelmingly approved the "40–40" proposal by a vote of 37 to 2, voting to divert the total amount of the wage increase into the pension trust. Immediately after the vote Koerner walked across the street from the plant meeting room to the corporate offices, and showed the tally of ballots to Roger Noel and Brackney. Noel wadded up the tally of ballots and made some "rude comment" as he threw it back at Koerner.

On the following day Koerner received two letters from Roger Noel. One stating, inter alia, "It is not appropriate to vote an offer that was not made by the employer," and further stating that the parties were at impasse. The second letter advised Koerner to refer all further communications in writing to Respondent's attorney.

Cynthia Zimmerman, Respondent's treasurer, testified that during the 2½ hour December 8 negotiating session there was at first some initial confusion over the cost to employees should they contribute to the medical plan, as proposed by the Respondent.

"Retro 173.3 x 7 months [x 40 cents per hour]." This translates to $380 after taxes, a fixed amount on which the parties had agreed and which was a component of either alternative proposal. While Koerner so testified, I believe it is more likely that the quoted language also confused Koerner, and that the affidavit simply contained a spelling error. That is, it should state, ". . . nothing different from TA" rather than "noting different from TA." In either event, there is no showing that the employees voted on anything different from what had been agreed to on December 8.

Then, according to Zimmerman the parties "kind of talked back and forth and kind of reached what might've been common ground. Then there was (sic) still some issues to work out. Roger [Noel] was tired, we were all confused."[9] Then Mark Weber asked Zimmerman some "questions," as follows:

> He went through the 40 cents an hour and whether or not the employees could determine how much went into the pension. Then we went over the second proposal, which was a larger amount of money per hour and they [the employees] contributed to the medical expense.

In response to Weber's questions, Zimmerman simply replied, "Yes that's what we have been talking about," but she did not acknowledge to Weber that an agreement had been reached. After Weber left, according to Zimmerman, "We were talking about this and that. Then the meeting just kind of ended" and "We said we would go back and write up our offer. When we left, we all shook hands and Bob said, 'Put it in writing. We said okay.'" According to Zimmerman—and also according to Brackney and Estes—only Roger Noel had the authority to say yes or no on behalf of the Respondent, and Noel never said during the meeting

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[9] Zimmerman was not asked to elaborate and did not elaborate. She was not asked to explain and did not explain the parameters of the "common ground" that was reached regarding the parties' respective preferences; or what "issues to work out" remained to be resolved; or who were "confused" and what they were confused about after the initial confusion over the medical plan had been resolved.

anything to the effect that, "Yes, I agree to the proposal that employees will be able to determine the amount of wage increases that will be allocated to pension."

Koerner testified that Zimmerman took notes during the bargaining sessions and his affidavit specifies that he observed Zimmerman taking notes at the December 8 session; and Weber testified that he too observed Zimmerman taking notes during the December 8 session. However, Zimmerman neither produced any notes nor testified that she did not take notes during the December 8 session or any of the earlier sessions, nor otherwise explained the absence of her notes.

The Respondent called Matthew Urlacher as a witness. Urlacher, a member of the bargaining unit and of the Union's bargaining team, has worked for the Respondent for 41 years. Urlacher testified that at the December 8 meeting both sides "got a little loud . . . [and] disagreed quite a bit on . . . what they believe is better." After a break and the parties went back to the table, "It was calmer. I don't know exactly what they were talking about when they got back. Roger and Bob were mainly talking back and forth." Urlacher was not asked what had been agreed upon during the December 8 session, what the respective positions of the parties were, or what issues remained to be resolved. Although he voted in the ratification vote, he was not asked whether the ratification vote reflected what had been agreed to on December 8.

Plant Manager Sam Brackney testified that shortly before the December 8 meeting ended, Weber asked questions about "some of the things" that had been discussed, and he wrote it down. Zimmerman did not tell Weber that the company had "agreed" the employees could choose the amount of the wage increase that would be diverted to the pension plan: "She did not say agreed. She said we have discussed it."

The meeting ended with the understanding that the Respondent would "write up a proposal and present it to [the Union]."

Regarding his various conversations with Weber about the matter, Brackney testified that the following morning he did discuss with Weber what went on at the meeting, and "believes" he did say to Weber, "I'm glad this is almost over." Brackney did not testify about what he discussed with Weber that morning, and maintains the remark that he made referred not to any agreement reached at the meeting, but rather to the fact that he knew the Respondent was going to present to the Union a new proposal, "and I knew what the offer was going to be from the company and I knew the employees would accept that offer." In this regard, Brackney testified that he had been made aware of this new offer by an email sent to him by Zimmerman. However, when the email from Zimmerman was produced by the Respondent, upon the General Counsel's demand at the hearing, showing that the email from Zimmerman was a copy of the email Zimmerman had sent to Koerner at 4:02 PM and forwarded to Brackney at 4:11 PM, Brackney recanted his prior testimony,

said he had been mistaken, and that he had learned about the proposal during a face-to-face conversation with Zimmerman that morning prior to his conversation with Weber. Zimmerman told him what the proposal was going to be and asked him if he thought the employees would accept it, and Brackney told her, "Yeah, I'm pretty sure they will accept it." Brackney did not testify why he thought the Union would accept such an offer.

Brackney was not asked about his later conversation with Weber that afternoon regarding the "retro check pool," as testified to by Weber, supra.

The following day, according to Brackney, he and Weber did have a further conversation about the matter. They were talking about what Weber "believed" the December 8 offer was, and what Brackney "knew" the new offer was. Weber thought the "40–40" offer gave the employees the choice of determining how much went into the pension trust fund. Brackney simply told Weber that was not the Respondent's offer. However, he did not tell Weber what the Respondent's new offer was because he "wasn't 100% sure, but I had not seen it, but I knew what it was." However, as noted, Brackney had earlier testified that he had in fact seen the new offer the day before and "knew the employees would accept that offer."

Roger Noel testified that during the December 8 negotiations, "We talked about wages, we talked about pension, what's conversion, all kinds of things." It appeared to Noel that Koerner was trying to "push" the Respondent for a "commitment." Noel did not

testify regarding the details or even the nature of the "commitment," but merely testified the Respondent was not ready to make any kind of commitment to the Union. Noel did not testify about Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, according to Noel, "we said we'd get back to him [Koerner]. We'd give him a written proposal." During the phone conversation with Koerner on December 10, Noel said he wanted to continue negotiations with Koerner, but Koerner refused to negotiate further.

CFO Larry Estes testified that, "We turned most of it [the negotiations] over to Cindy [Zimmerman.]" Estes did not testify that the December 8 meeting was chaotic or disorganized or that he didn't know or understand what was being negotiated during the course of the meeting. Estes did not testify regarding Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, Koerner said, "you guys go back and write something up and get it back to me." Estes said. "yes, we will."

On January 13, 2011, the Union sent copies of the new collective-bargaining agreement,[10] executed by John Parks, secretary-treasurer of the Union, reflecting the terms ratified by the unit members as discussed above. Koerner also hand delivered an execu-

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[10] While there is no contention by the Respondent that the proffered contract is inaccurate in any respect, the contract language specifies that the contract extends from October 1, 2010, to September 30, 2013. This is apparently incorrect, as the parties had agreed upon a two-year term.

ted copy to the Respondent. To date the Respondent has refused to execute the contract or honor the terms of the new agreement, including the payment of the retroactive bonus to the employees.

Analysis and Conclusions

I found Koerner and Weber[11] to be highly credible witnesses, with their contemporaneous notes of the December 8 meeting reinforcing their mutually consistent testimony regarding the agreement reached at that meeting. In contrast, it is significant that none of the Respondent's witnesses either produced notes of the meeting or explained why no notes were available. Nor did Zimmerman contradict Weber's testimony that he observed her taking notes. I therefore conclude that Zimmerman did in fact take notes and that her notes would not support the Respondent's position that no agreement was reached.

The testimony of Noel, Zimmerman, Brackney, and Estes was abbreviated, conclusionary, nonspecific, and unconvincing. It is significant that none of these individuals stated what proposals were in fact made by either the Respondent or the Union during the Decem-

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[11] Weber, a long-time employee who was present for just that one December 8 meeting as a replacement for the union steward, has not been shown to harbor any bias. He was simply recruited to attend the meeting at the last minute, in place of the injured union steward, with the understanding that he would be a messenger and report back to the employees what had occurred during negotiations. He explained this role to the Respondent's representatives, and was very careful to insure the accuracy of the information he would relay to the employees at the plant.

ber 8 session. Nor did they deny Weber's very precise testimony in which he specifically quoted Noel. Thus, according to Weber's testimony, at the conclusion of the December 8 meeting, after the terms of the agreement had been reviewed and confirmed by Weber and Zimmerman, and after it had been further confirmed that the new contract would begin October 1, Noel finalized this understanding and meeting of the minds by concluding the substantive portion of the meeting with his comment, "then let's do it." As noted, Weber's recollection of this colloquy stands unrebutted, and I credit Weber.

Brackney's testimony regarding his various conversations with Weber on December 9 and 10 is also confusing. The scenario presented by Brackney regarding his discussion with Weber on the morning of December 9 is nonsensical and obviously contrived. According to Brackney, he told Weber he, too, was happy the matter was "almost over." Brackney claims he made this statement not because he was agreeing with Weber that an agreement had been reached, but rather because he knew that a new proposal (of which the Union had not yet been apprised, and which on its face was clearly inferior to the proposal the Union favored during negotiations) would nonetheless be accepted by the Union. Brackney's purported prescience in this regard defies credulity. Clearly, Brackney's testimony is false, and he made this statement to Weber because he and Weber were of the common understanding that a new contract had in fact been reached. I so find.

The Respondent maintains that because it strongly preferred its own pension plan over the Union's pension trust, or for other reasons, it would not have agreed to permit the employees to unilaterally determine how much of any wage increase would be diverted into the Union's pension trust. This contention is belied by the fact that on November 15 the Respondent made this very proposal. Thus, the Respondent's first wage and pension proposal, presented to the Union at the November 15 bargaining session, was a written proposal as follows: 33 cents per hour for each year of a 2-year contract, with the additional component that "Employees to decide breakdown between wages and pension." Accordingly, I find no merit to the Respondent's contention.

Furthermore, given the fact that the Respondent did initiate such a written proposal on November 15, and the Union countered at the next negotiating session on December 8 with 45 cents per year rather than 33 cents, as Koerner testified, supra, it is reasonable to assume, again as Koerner testified, that it was the Respondent that proposed a compromise figure of 40 cents per hour to which the Union agreed. I so find.

The Respondent maintains that Washington State law precludes legal enforcement of verbal contractual agreements. Whatever the parameters of Washington State law regarding verbal contractual agreements, this matter is not subject to state law. Under Federal law, it is clear that the verbal agreement reached here is valid and enforceable. Once a verbal agreement is reached by the parties, they are obligat-

ed to abide by the terms of the agreement even though those terms have not been reduced to writing. *H.J. Heinz v. NLRB*, 311 U.S. 514 (1941); *Young Women's Christian Association (YWCA)*, 349 NLRB 762, 771 (2007); *Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998).

On the basis of the foregoing, I find that the December 8 bargaining session concluded with a verbal agreement and meeting of the minds on all substantive issues of a collective-bargaining agreement, and, in addition, on the amount of the retroactive bonus for the unit employees. The agreement provided for the Union to conduct a vote of the unit employees to decide which wage/pension option to adopt, and for the Union and Respondent to be bound by the results of the vote. The vote was conducted on December 15; the unit employees voted to accept the "40–40" option which included the component that the employees would determine how much of the 40 cents to divert to the Union's pension trust; and the Union subsequently prepared, executed, and forwarded the collective-bargaining agreement, reflecting the terms of the ratification vote, to the Respondent. To date the Respondent has failed and refused to pay the employees the agreed-upon retroactive bonus, or to execute and abide by the terms of the contract. By such conduct I find the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act as alleged. *Young Women's Christian Association (YWCA)*, supra.

The complaint also alleges that the statements by Roger Noel during the December 8 bargaining session

violate Section 8(a)(1) of the Act. I credit Weber, who testified that during the negotiating session Noel twice said, apparently to Urlacher and Weber who were the only employees present, "If you just get out of the Union, I'll give you anything you want." On the first occasion Noel acknowledged that such a statement might be unlawful, and on the second occasion he stated he didn't mean it. I conclude that Noel's timely and specific retraction of his comments is sufficient to warrant a dismissal of this allegation of the complaint. *Siemens Building Technologies, Inc.*, 345 NLRB 1108, 1115 (2005). Accordingly, this allegation of the complaint is dismissed.

Conclusions of Law and Recommendations

1. The Respondent Noel Canning, A Division of the Noel Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

4. The Respondent has not violated Section 8(a)(1) of the Act as found herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend that it cease and desist therefrom and from in any other like or related manner interfering with, re-

straining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act. I shall recommend that the Respondent forthwith sign the collective-bargaining agreement embodying the terms of the agreement between it and the Union as found herein, and give effect to such agreement retroactive to October 1, 2010. I shall further recommend that the Respondent make whole its employees and the union pension trust fund, with interest, for the amounts that would have would have been paid into the trust fund from October 1, 2010. Further, I shall recommend that the Respondent pay to its employees the agreed-upon amount the employees would have received as a retroactive bonus, with interest. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[12]

The Respondent Noel Canning, A Division of the Noel Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by refusing to execute the collective-

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[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining agreement presented to the Respondent by the Union to become effective October 1, 2010. The Union is the exclusive collective-bargaining representative of employees in the unit described below:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

(b) Failing and refusing to make its employee and the union pension trust whole for any loss of wages or retroactive pension amounts.

(c) Failing and refusing to pay to its unit employees the agreed upon retroactive bonus reached during negotiations for a new contract.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Forthwith sign the collective-bargaining agreement with the Union dated October 1, 2010.

(b) On the execution of the agreement, give effect to the provision of the agreement retroactive to October 1, 2010, and make its employee and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

(c) Make its unit employees whole, with interest, for the amount they would have received as a retroactive bonus as agreed upon by the Respondent and Union during negotiations.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the monetary amounts specified herein.

(e) Within 14 days after service by the Region, post at its facility and place of business in Yakima, Washington, copies of the attached notice marked "Appendix."[13] Copies of the notice on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[13] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. September 26, 2011

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Teamsters Local 760 as the exclusive representative of the em-

ployees in the following appropriate unit concerning terms and conditions of employment:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, forthwith sign the collective-bargaining agreement with the Union dated October 1, 2010.

WE WILL, on the execution of the agreement, give effect to the provision of the agreement retroactive to October 1, 2010, and make our employees and the union pension trust fund whole, with interest, for any loss of wages or retroactive pension amounts.

WE WILL make our unit employees whole, with interest, for the amount they would have received as a retroactive bonus as agreed upon during negotiations.

NOEL CANNING, A DIVISION OF THE NOEL CORP.

APPENDIX C

157 Congressional Record S8783-S8784 (daily ed. Dec. 17, 2011) reads in pertinent part:

* * * * *

ORDERS FOR TUESDAY, DECEMBER 20, 2011 THROUGH MONDAY, JANUARY 23, 2012

Mr. WYDEN. Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Tuesday, December 20, at 11 a.m.; Friday, December 23, at 9:30 a.m.; Tuesday, December 27, at 12 p.m.; Friday, December 30, at 11 a.m.; and that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Friday, January 6, at 11 a.m.; Tuesday, January 10, at 11 a.m.; Friday, January 13, at 12 p.m.; Tuesday, January 17, at 10:15 a.m.; Friday, January 20, at 2 p.m.; and that the Senate adjourn on Friday, January 20, until 2 p.m. on Monday, January 23; that following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, and the time for the two leaders be reserved for their use later in the day; further, that

following any leader remarks the Senate be in a period of morning business until 4 p.m., with Senators permitted to speak therein for up to 10 minutes each, and that following morning business, the Senate proceed to executive session under the previous order.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. WYDEN. The next rollcall vote will be on Monday, January 23, at 5:30 p.m. on confirmation of the Gerrard nomination.

ADJOURNMENT UNTIL TUESDAY, DECEMBER 20, 2011, AT 11 A.M.

Mr. WYDEN. If there is no further business to come before the Senate, I ask unanimous consent that the Senate stand adjourned under the previous order.

There being no objection, the Senate, at 3:33 p.m., adjourned until Tuesday, December 20, 2011, at 11 a.m.

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APPENDIX D

1. The United States Constitution provides in pertinent part:

Art. I:

* * * * *

§ 3:

Cl. 2:

and if Vacancies [in the Senate] happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

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Cl. 5:

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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§ 4, Cl. 2:

The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

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§ 5, Cl. 4:

> Neither House, during the Session of the Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

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§ 7, Cl. 2:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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Art. II, § 3:

> [The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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Amend. XX, § 2:

> The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

2. 29 U.S.C. 153 provides, in pertinent part:

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to

delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

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3. 29 U.S.C. 160 provides, in pertinent part:

Prevention of unfair labor practices

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(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record con-

sidered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have

been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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